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In The

Supreme Court of the United States

October Term, 1995

WILLIAM BREGAR,

Petitioner,

vs.

THE CITY OF CLEVELAND,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a corporation, created by private individuals pursuant to special enabling legislation, which is formed for the purpose of effecting urban renewal through the construction and operation of an athletic complex hosting major league sports franchises, should be considered a state actor for purposes of First Amendment analysis, when the governments of the city and county within which the athletic complex is located are given the right to appoint, at their sole discretion, the entire board of the corporation's trustees, and when that corporation cooperates with the city and county in which it is located in a long term program of urban renewal and economic development?

2. Whether a corporation so formed and so governed may, through the use of a generally applicable criminal trespass ordinance, exclude peaceful pickets from the sidewalks to which it holds title, when those sidewalks are everywhere contiguous with and adjacent to the public sidewalks of a busy urban district, and are generally open to members of the public, and when the corporation has no written policy limiting the circumstances under which pickets can be excluded from the sidewalks at issue?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Bregar respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this matter, and the prior decision of the Ohio Court of Appeals, which that judgment let stand without review.

OPINIONS BELOW

The judgment of the Supreme Court of Ohio, dismissing as not involving a substantial constitutional question the Petitioner's appeal below, was entered March 6, 1996. It is reprinted in the appendix to this petition at page App.50. The opinion of the Ohio Court of Appeals has not yet been published. It is reprinted in the appendix to this petition beginning at page App.1. The unreported opinion in *Associated Builders and Contractors v. Gateway Economic Dev. Corp. of Greater Cleveland, Inc.*, No. 1:92-CV-0649 (N.D.Ohio filed May 12, 1992), which is quoted at length in the opinion of the Ohio Court of Appeals, is reprinted in the appendix to this petition beginning at page App.20.

JURISDICTION

On September 29, 1994, Petitioner William Bregar was convicted, in Cleveland Municipal Court, of having committed criminal trespass in violation of Cleveland Codified Ordinance §623.04(a). He was fined $100, given a jail sentence of thirty days (which was suspended), and

placed on inactive probation for one year. (App.6). On October 7, 1994, Petitioner appealed his conviction to the Ohio Court of Appeals for the Eighth Appellate District, which, on October 10, 1995, affirmed the decision of the trial court and upheld the Petitioner's conviction. (App.1, App.18). On November 24, 1995, the Petitioner filed a Notice of Appeal and a Memorandum in Support of Jurisdiction in the Ohio Supreme Court, which on March 6, 1996, dismissed that appeal for want of a substantial constitutional question. (App.50).

The jurisdiction of this Court to review the March 6, 1996 judgment of the Ohio Supreme Court is invoked pursuant to 28 U.S.C. §1257(a).

THE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

> life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code §307.696 and Cleveland Codified Ordinance §623.04(a) are reprinted in the appendix to this petition, beginning at pages App.51 and App.57, respectively.

STATEMENT OF THE CASE

On September 29, 1994, the Cleveland Municipal Court convicted Petitioner William Bregar of criminal trespass under Cleveland Codified Ordinance §623.04(a), imposed a $100 fine and a thirty day suspended jail sentence, and placed Mr. Bregar on inactive probation for one year. (App.6).

Petitioner was convicted of criminal trespass in connection with peaceful picketing which he conducted outside Cleveland's major league baseball stadium (Jacobs Field) during August 1994. To register his concern over the impending major league baseball strike, Mr. Bregar appeared outside Jacobs Field on August 2, 1994, carrying a hand-lettered cardboard sign on which he had written the message "A Field of Greed." (App.2). Private stadium security officers notified Cleveland Police Commander Joseph Sade of his protest. Mr. Bregar had initially chosen to display his sign near Gate A, one of the principal entrances to Jacobs Field. Commander Sade informed him that he was obstructing pedestrian traffic in that location,

and escorted him to an Ontario Street sidewalk, where he displayed his sign without further objection. (App.3).[1]

To understand the events that followed, it is helpful to understand the geography involved. Jacobs Field is located in downtown Cleveland. It is nearly adjacent to Gund Arena, which is home to the Cleveland Cavaliers basketball team, and which also hosts a variety of other attractions.

These two facilities are the principal components of the Gateway Complex, a sprawling downtown development which includes an indoor parking facility, two large pedestrian plazas, and a number of pedestrian walkways wholly contained within its perimeter. The Gateway Complex is also surrounded by an outer ring of sidewalks, which are contiguous with, and adjacent to, the public sidewalks of the City of Cleveland. (App.2-4).[2]

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[1] Though a Commander in the Cleveland Police Department, Sade was at all times relevant hereto employed in a private capacity, supervising the other off duty police officers who provide security at Jacobs Field during baseball games. (App.3).

[2] See also: Defendant's Motion to Dismiss and Supporting Memorandum of Law filed August 22, 1994, at 7. Because the Ohio Supreme Court dismissed the Petitioner's appeal below, there exists no independently paginated record of proceedings in the Ohio Court of Appeals. Documents contained in that record are cited herein by caption and page number. Citations to the transcript refer to the transcript of testimony heard at oral argument on Mr. Bregar's motion to dismiss the charges against him. That hearing was held in the Cleveland Municipal Court on September 29, 1994.

Title to the Gateway Complex rests with the Gateway Economic Development Corporation of Greater Cleveland, Inc. (the "Gateway Corporation"), a nominally private, non-profit corporation, which was organized, pursuant to Ohio Revised Code §307.696, for the purpose of constructing professional athletic facilities in the City of Cleveland. (App.2-3).

A portion of the Ontario Street sidewalk is uncontestedly public property. The line dividing Gateway Corporation property from purely public property divides that sidewalk into two bands. The inner band, nearer the stadium, is titled to the Gateway Corporation. The contiguous outer band, farther from the stadium, is city property. (App.4).

In places, a line of trees and planting beds is installed near this property line, which runs roughly down the center of the Ontario Street sidewalk. There is no visible indication to pedestrians that they have passed from public property and into the Gateway Complex. (Transcript, September 29, 1994, Sade, at 35-9). Police Commander Sade testified below that both portions of the sidewalk are freely open to the public at all times, and that pedestrians tend to use the "public" sidewalk and the "Gateway" sidewalk in roughly equal numbers, except during sporting events, when pedestrians favor the "Gateway" portion of the sidewalk. (Id.).

On August 3, 1994, Mr. Bregar returned to the Ontario Street sidewalk to which he had been escorted the previous evening, and displayed his sign with incident. (App.3).

Mr. Bregar returned to Ontario Street sidewalk again on August 4, 1994, to display his sign in the area to which he had been escorted two nights before. Sometime after his arrival, Mr. Bregar was asked by Commander Sade to take his sign to the "public" portion of the sidewalk, west of the trees running along the property line. (App.4). He refused this and subsequent requests to move. Commander Sade then read the criminal trespass ordinance to Mr. Bregar, and informed him that Gateway Corporation policy prohibited the obstruction of pedestrian traffic. Mr. Bregar again refused to move across the property line. He was arrested and charged with criminal trespass. (App.4-5).

On August 22, 1994, Mr. Bregar entered a plea of Not Guilty, and moved the Cleveland Municipal Court to dismiss the charge against him, asserting a First Amendment right of access to the sidewalk on which he was arrested, and further asserting that the Gateway Corporation had acted as an agency of the state in excluding him from the sidewalk. (Defendant's Motion to Dismiss and Supporting Memorandum, filed August 22, 1994, at 4-9). In a supplemental memorandum filed September 29, 1994, Mr. Bregar argued that the symbiotic relationship between the City of Cleveland and the Gateway Corporation made the Gateway Corporation a state actor for purposes of First Amendment analysis, and made the sidewalk at issue a public sidewalk, to which he had a right of access. (Defendant's Supplemental Memorandum, filed September 29, 1994, at 4-7).

After an oral hearing held September 29, 1994, the trial court denied the Petitioner's motion to dismiss. Mr.

Bregar changed his plea to No Contest, and was convicted of criminal trespass. (Transcript of September 29, 1994, Court, at 46-7).[3]

On appeal, Mr. Bregar asserted a First Amendment right of access to the sidewalk on which he was arrested, arguing that either: (1) the nature of the Gateway Corporation as a state actor, or, in the alternative, (2) the nature of the sidewalk as a generally accessible public thoroughfare, gave him the right to picket there without prior permission. (App.7, App.15-17). Mr. Bregar also argued that a generally applicable criminal trespass ordinance could not be considered a reasonable time, place or manner restriction on the use of an otherwise traditional public forum, because such an ordinance vested in property owners the unfettered discretion to exclude unwelcome demonstrators. (App.17-18).

The Ohio Court of Appeals rejected these arguments, affirming the Petitioner's conviction. (App.18). Mr. Bregar raised the same arguments in the Ohio Supreme Court, in support of his jurisdictional motion. (Memorandum in Support of Jurisdiction, filed November 24, 1995, *passim*). On March 6, 1996, that court dismissed Mr. Bregar's appeal, holding that it presented no substantial constitutional question. (App.50).

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[3] Due to a stenographic error, the line or lines of type recording the Petitioner's change of plea are not reflected in the transcript.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Ohio Supreme Court let stand an erroneous decision, which misapplied this Court's teaching with respect to state action, and allowed the discretionary exclusion of peaceful protestors from an area that the Ohio Court of Appeals held to be a public forum.

I. The Gateway Corporation should be deemed a state actor for purposes of First Amendment analysis, and the decision below erred by improperly applying this Court's recent holding in *Lebron v. National R.R. Passenger Corp.*, ___ U.S. ___, 115 S.Ct. 961 (1995), to hold otherwise.

In considering whether the Gateway Corporation should be deemed a state actor for First Amendment purposes, the Ohio Court of Appeals focused closely on the history and structure of that corporation.[4] But the

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[4] No independent record was created below with respect to the Gateway Corporation's history, corporate structure or role in the creation and operation of the Gateway Complex. The City of Cleveland, in a brief filed in the Cleveland Municipal Court, relied in part upon a decision of the United States District Court for the Northern District of Ohio, *Associated Builders and Contractors v. Gateway Economic Dev. Corp. of Greater Cleveland, Inc.*, No. 1:92-CV-0649 (N.D.Ohio filed May 12, 1992), to support its claim that the Gateway Corporation is a private entity. (Brief in Opposition to Defendant's Motion to Dismiss, filed September 21, 1994, at 3). *Associated Builders* directly addressed the Gateway Corporation's history and corporate structure in holding that it was not a political subdivision for purposes of the National Labor Relations Act, and not a governmental agency for purposes of the Employee Retirement Income

lower court's analysis was badly flawed, in that it focused on the permissive legislation authorizing the Gateway Corporation's role in downtown development to the near exclusion of other relevant factors:

> At first blush, *Lebron* appears to be controlling [of the state action question presented below]. After reviewing the creation of Gateway and applying the facts of this case, we must conclude that *Lebron* is not controlling and that Gateway is not a government actor or agency for purposes of the First Amendment.

(App.13-4). Relying on *Associated Builders*, the Ohio Court of Appeals focused on the legislative genesis of the Gateway Corporation:

> The reason for this conclusion is that unlike Amtrak, whose creation was mandated by a special law, Gateway was formed pursuant to [Ohio Revised Code §] 307.696 [which section] was not a directive, but instead an authorization permitting non-profit corporations to be formed for the purpose of constructing and/or operating sports complexes.

(App.14). The court below then drew directly upon *Associated Builders* to support its holding:

> Whether a non-profit corporation is a political subdivision depends not on whether its formation is mandated or merely authorized; the difference is whether its formation is attributable to private, rather than governmental action.

Security Act, and the Fourteenth Amendment. (App.35-37). The Ohio Court of Appeals took judicial notice of the factual findings recited in *Associated Builders* in its own opinion regarding the Gateway Corporation's status as a potential state actor. (App.7-12, 14-15).

> When a state mandates the creation of an entity, that entity is fairly called a governmental actor. When the state allows, instead of mandates, local government to create an entity, that entity, if formed, is still a government actor, since it was a local government that formed it. Only if an entity is allowed to be formed by a private actor is the entity a nongovernmental actor.

(App.14, *quoting Associated Builders, supra. See also:* App.41).

Both the Ohio Court of Appeals (App.15), and the district court opinion on which it relied (App.40), noted that the Gateway Corporation has taken on some characteristics of a public entity. But the appellate court below found the fact of private formation to be dispositive (App.14), noted that the Gateway Corporation lacked other characteristics often attributable to public entities (such as the power to subpoena and tax, App.15), and concluded that it must be deemed a private entity. (App.15).

This logic is twice flawed. The decision below adopted an indefensibly narrow reading of *Lebron*, at odds with this Court's prior jurisprudence. It also conflated this Court's teaching with regard to state action generally, with the more narrow question of what constitutes a political subdivision for purposes of the National Labor Relations Act. That more narrow question shaped the district court's analysis in *Associated Builders*, and the Ohio Court of Appeals erred in uncritically adopting an analysis based primarily upon this Court's holding in *N.L.R.B. v. Natural Gas Utility District of Hawkins County,*

Tennessee, 402 U.S. 600 (1971), in the context of a First Amendment dispute.

In so deciding, the Ohio Court of Appeals failed to squarely address the principal issue on which the Petitioner now seeks guidance from this Court, and on which this Court has not directly held: whether a privately formed corporation, with a government-appointed board of trustees, which has deep ties to local government, should be considered a state actor for purposes of First Amendment analysis.

A. This Court's holding in *Lebron* establishes conditions which are sufficient, but not necessary, to support a finding of state action.

For over three decades, this Court has taught that a private entity with sufficiently close ties to the government can be considered a state actor for purposes of constitutional analysis.

Only last term, this Court examined with specificity the sorts of connections between a nominally private entity and the government that will support a finding of state action. In deciding that the National Railroad Passenger Corporation ("Amtrak") was a state actor, this Court considered the history, mandate and governance of that corporation, and held that:

> [W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, that corporation is

> part of the Government for purposes of the First Amendment.

Lebron, ___ U.S.___, 115 S.Ct. at 974-75. The Ohio Court of Appeals erroneously applied the tripartite state action test in *Lebron* as though it were the ***only*** route by which a private corporation might be deemed a state actor. Of course, it is not.

The touchstone of the "symbiotic relationship" test for state action first articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), is whether the relationship between the government and a private entity, ***taken as a whole***, is strong enough to support a finding of state action.

> As our subsequent discussion in *Burton* made clear, the dispositive question in any state action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility.

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 359 (1974).

The Ohio Court of Appeals ignored this teaching when it held that the Gateway Corporation's private formation precluded a finding of state action. (App.14). Nothing in this Court's prior decisions suggests that a privately formed corporation cannot be considered a state actor. Indeed, several of this Court's decisions hold or teach otherwise.

In what became known as the *Girard College Case*, *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230 (1957) (*per curiam*), this Court held that the segregationist policies of Girard College violated

the Fourteenth Amendment, despite the fact that the college had been "built and maintained pursuant to a privately erected trust." *Lebron*, ___ U.S. at ___, 115 S.Ct. at 973 (*quoting: Girard College Case*, 353 U.S. at 231). Like both Amtrak and Girard College, the Gateway Corporation is controlled by a board appointed entirely by government officials. (App.25-27).[5]

In *Burton*, this Court held the discriminatory conduct of a private restaurant to be state action based upon the depth of its financial relationship with a metropolitan parking authority. *Burton*, 323 U.S. at 323-35. The acts of wholly private entities can also be considered state action when those entities operate in concert with state authorities to deprive a citizen of his rights. *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 941-42 (1982); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

B. Under the doctrine announced in *Burton v. Wilmington Parking Authority*, The Gateway Corporation should be considered a state actor for purposes of federal constitutional analysis, based upon its deep and pervasive links to local government.

In *Burton*, this Court held a private restaurant located in a public parking garage to be a state actor for Fourteenth Amendment purposes based on the financial ties between the restaurant and the government. When:

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[5] The City of Cleveland and the Commissioners of Cuyahoga County, Ohio, each appoint four members of the Gateway Corporation's nine member board, and jointly select the ninth member. (App.25).

> The State has so far insinuated itself into a position of interdependence with [a private actor] that it must be recognized as a joint participant in the challenged activity [that activity] cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.

Burton, 365 U.S. at 725. The interdependence found in *Burton* was largely economic: the land on which the government operated parking facility had been built had been acquired by government purchases, and funded by the sale of government bonds. The long-term lease under which the private restaurant operated was born of the government's need to service the debt created by those bonds. *Id.* at 718-19.

> The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Assuming that the distinction would be significant, the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit.

Id., at 724-25. Though only a lessor, this Court found the parking authority in *Burton* stood to profit by the discriminatory policies of its private tenant, and thus attributed that discrimination to the government agency which had "place[d] its power, property and prestige behind the admitted discrimination." *Id.*, at 725.

The financial interdependence between the Gateway Corporation and local governments is at least as deep as that which supported a finding of state action in *Burton*. Indeed, the facts in the instant case, more strongly than in *Burton*, suggest that the Gateway Corporation and the government are co-equal participants in a long-term financial venture.

To facilitate urban renewal, the City of Cleveland acquired property in its blighted Central Market district, and in 1986, began to convey that property to the Greater Cleveland New Stadium Corporation ("GCNSC"), the corporate predecessor of the Gateway Corporation. (App.7-8, App.22). The Gateway Corporation, into which the GCNSC merged in 1990 (App.8, App.22), was formed "in contemplation" of Ohio Revised Code §307.696 (App.8, App.23). That section provides a detailed framework, within which the Gateway Corporation, the City of Cleveland, and Cuyahoga County may cooperate to finance, construct, and operate an athletic complex. And while §307.696 does not require either the City or the County to enter into an agreement with the Gateway Corporation, that section does substantially shape the financial contours of any such relationship.

Under Ohio R.C. §307.696(B), the contents of any agreement between a non-profit corporation and the city and county in which it operates a sports facility, is strictly delimited. (App.52).[6] Such an agreement must require the

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[6] While the Ohio Court of Appeals read Ohio R.C. §307.696 as broadly permissive, the extent to which that section was specifically intended by the state legislature to expedite the construction of the Gateway Complex may not only be inferred

corporation either: (1) to pledge all of its operating revenues to offset the debt service charges incurred in connection with financing the construction of the sports facility through the issuance of bonds, §307.696(B)(1)(a), or (2) to pledge the remainder of its revenues to other economic development projects within the host municipality. §307.696(C)(2). (App.52). The statute, at §307.696(B), also makes the levying of a county tax a requirement for any county wishing to enter into an agreement with a non-profit corporation formed under §307.696(B)(1)(b). (App.52).

The actual agreement between the Gateway Corporation, the City of Cleveland, and Cuyahoga County betrays a pervasive financial interdependence. That agreement allowed the Gateway Corporation to issue $200 million in bonds on behalf of the city to finance the construction of the Gateway Complex. (App.10, App.24). Cuyahoga County levied a special tax and pledged the revenue therefrom both to secure the bonds and to finance half or less of the construction costs associated with the Gateway Complex. (Id.). The City of Cleveland agreed to assist the Gateway Corporation in succeeding to the GCNSC's interest in real property which the city had helped Gateway's predecessor corporation acquire. (App.9, App.24).

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from the fact that the Gateway Corporation was created "in contemplation" of §307.696 (App.23), but from the commonly known fact that, at the time the Gateway Corporation was formed, only two Ohio cities, Cleveland and Cincinnati, were eligible to enter agreements with such a corporation based on their "association with" a major league baseball, football or basketball franchise. §307.696(A)(6). (App.52).

Finally, while the Gateway Corporation holds title to the Gateway Complex, it is obligated to convey ownership of that facility to the City of Cleveland, after the bonds financing the facility's construction have been retired. (App.10, App.24).

Each of these connections might, in itself, be insufficient to support a finding of state action, and Petitioner concedes that neither regulation by the government, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), nor the receipt of county tax revenues, *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982), are in themselves conditions sufficient to transform private conduct into state action. But the "aggregate of all the relevant factors," in this case, *Metropolitan Edison Co.*, 419 U.S. at 359, shows a deep symbiosis among the Gateway Corporation, the City of Cleveland, and Cuyahoga County.

Like the parking authority in *Burton*, both the City and the County have a deep financial interest in the success of the Gateway project. To the extent that the decision to exclude protestors from the sidewalks around Jacobs Field increases attendance and fan loyalty, the City – which facilitated the construction of the Gateway Complex through the acquisition of blighted property, and which will ultimately take title to that Complex when the bond debt is retired – stands directly to benefit. The symbiosis is at least as deep as that in *Burton*, where the nominally private actor was merely a tenant and not (as here) a partner in a joint economic venture.

That the Gateway Corporation should be considered a state actor for First Amendment purposes simply makes sense. Not only does the corporation enjoy a symbiotic

relationship with the government: in excluding Mr. Bregar from its sidewalks it has acted through, and in concert with, the government.

On occasions when private parties act "in concert with state actors," private conduct "can be fairly attributable to the state." *Rendell-Baker*, 457 U.S. at 838, n.6. Such concerted action is present both in cases where private actors execute their decisions through an agency of the state, *Lugar*, 457 U.S. at 937, and when there is a "sufficiently close nexus between the State and the challenged action" to impute nominally private action to the state. *Blum*, 457 U.S. at 1004; *Metropolitan Edison*, 419 U.S. at 351.

The Gateway Corporation received significant assistance from the state in excluding Mr. Bregar from its sidewalks, through the involvement of police officers (albeit in an off duty capacity) to threaten and then effect his arrest. *Compare: Lugar*, 457 U.S. at 941 (execution of an *ex parte* writ of attachment involving sheriff deemed state action) *with Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) (warehouseman's use of self-help statute not attributable to the state absent official involvement). And – as has been outlined more completely above – the City played a substantial role in collecting the real property on which the Gateway Complex sits, and in ensuring that the Gateway Corporation succeeded to the property rights of its predecessor. (App.9, App.24).

Finally, the decision to exclude Mr. Bregar, and protestors generally, from the exterior sidewalks adjacent to the Gateway Complex should be fairly attributable to the state. The ultimate authority to make corporate policy

rests with Gateway's board of trustees, who have control of Gateway property. (App.26). The right to control the composition of that board may initially have been granted to the City and the County by the Gateway Corporation itself (App.44-45), but that is a power that both the City and the County have taken affirmative steps to preserve.

The provisions governing the appointment of its corporate board are found in the Gateway Corporation's Code of Regulations. (Id.). Under the terms of its tripartite agreement with the City and County, the corporation is bound to follow its own Code. (App.10, App.25). The board of trustees are free to amend that Code with respect to every provision but one. They may not alter, without the approval of both the City and the County, the provisions governing their own appointment and removal. (App.11-12, App.26). Through the tripartite agreement, the City and County have ensured that they will always retain control over the composition of that board. And the board, ultimately answerable to the City and the County, is ultimately responsible for the policy of exclusion under which Mr. Bregar was arrested. The board's actions should be attributable to the state actors by which it is controlled.

The Gateway Corporation is not merely a private corporation. Instead it is the agency through which the City and the County have decided to build the Gateway Complex. Government actors facilitated its acquisition of property, cooperate with it financially, and will ultimately take title to the sprawling complex which it has developed (and will for a time manage) on their behalf. This Court recently taught:

> That government-created and -controlled corporations are (for many purposes at least) part of the government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to avoid the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.

Lebron, ___ U.S. ___, 115 S.Ct. at 973.

No less than the federal government in *Lebron*, the City of Cleveland and Cuyahoga County have, in the Gateway Corporation, resorted to the corporate form to achieve a public purpose. That the corporate agent which they control was not chartered by them should make little difference. The Gateway Corporation has made itself the willing agent of the government, and has placed itself under government control. The simple fact of that control, and not its pedigree, should be sufficient to make the Gateway Corporation a state actor for purposes of First Amendment analysis.

II. A generally applicable criminal trespass ordinance, which vests in a property owner or its agent sole discretion regarding the exclusion of protestors, cannot be deemed a reasonable time, place or manner restriction on the exercise, in a traditional public forum, of expression which is otherwise protected by the First Amendment, and the decision below erred in holding otherwise.

Notwithstanding its conclusion that the Gateway Corporation is a private entity, the appellate court below

noted that the sidewalk on which Mr. Bregar was arrested was:

> practically unrestricted to pedestrian use, thereby allowing a demonstrator the exercise of free speech thereon. However, the exercise of that free speech is not completely unfettered in an area which is treated as a public fora [*sic*] for purposes of the First Amendment.

(App.16). Thus, despite the apparent conclusion that the sidewalk at issue should be regarded as a public forum, the appellate court below none-the-less held that Mr. Bregar's protest could be truncated as an unlawful trespass in the interest of public safety. (App.17-18). This defies both law and reason.

Petitioner contends that the sidewalk on which he was arrested is a public sidewalk, based upon the Gateway Corporation's status as a public entity, and that it is thus a traditional public forum, to which he enjoys a First Amendment right of access for purposes of peaceful protest. *United States v. Grace*, 461 U.S. 171 (1983) (public sidewalks, "without more," are to be considered traditional public fora).[7]

The criminal trespass ordinance under which Mr. Bregar was convicted reads in pertinent part:

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[7] The Ohio Constitution affords no greater protection to free expression than the First Amendment, *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 222 (1994). Accordingly, a state constitutional right of access to open-use private property, of the sort authorized in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), is not implicated in this case.

> (a) No person, without privilege to do so, shall do any of the following:
>
> * * *
>
> (4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of either . . . .

Cleveland Codified Ordinance §623.04(a). (App.57).

Under the plain meaning of the ordinance, one cannot be guilty of criminal trespass unless he is notified to leave the premises of another and fails to do so. But nothing in the ordinance itself, nor in the Gateway Corporation's internal operating procedures, limits the discretion of Gateway security personnel in excluding whomever they choose from the property.

Commander Sade testified in the Municipal Court that Gateway had no written policy regarding demonstrators, and that officers are instructed to exclude any demonstrators "causing inconvenience" to the public. (Transcript of September 29, 1994, Sade, at 34-5). This amounts to unfettered discretion, and to the extent the sidewalk at issue is a public forum, ignores this Court's prior holdings:

> Even when the use of its public streets and sidewalks is involved . . . a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question

> on the "welfare," "decency," or "morals" of the community.

Shuttlesworth v. Birmingham, 394 U.S. 147, 153 (1969).

The appellate court rejected Mr. Bregar's argument that security officials had unconstitutional, unbridled control over the public forum in which he was arrested, holding that his argument:

> overlooked the fact that the arresting officer's discretion is limited, under the circumstances of this case, to those situations involving persons who refuse to move *and* are creating safety hazards by virtue of their location.

(App.18) (emphasis in original). Of course, nothing in the record evidences limits on the discretion of officers to ask whomever they choose to move. Their only limitation is their subjective judgment that someone is "creating safety hazards by virtue of his location," a standardless power so open to potential abuse as to be unconstitutional. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1989), this Court taught:

> [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case

> whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Lakewood, 486 U.S. at 758.

A criminal trespass ordinance which vests total discretion regarding the exclusion of demonstrators in a property owner or its agents, consistent with *Lakewood* and *Shuttlesworth*, cannot be a legitimate time, place or manner restriction on expression in a traditional public forum. By its very nature, such an ordinance gives security personnel the unfettered power to exclude from the forum whomever they choose.

CONCLUSION

A sidewalk owned by an economic partner of the government, which is part of an athletic complex developed for the public benefit and managed by a government appointed board, title to which will ultimately return to the government, should be considered a public forum for First Amendment purposes. A criminal trespass ordinance giving the owner of such property unfettered discretion to exclude demonstrators at will is not a reasonable time, place or manner restriction on an otherwise public forum.

The Petitioner therefore respectfully requests that this Court grant his petition for the writ of certiorari, or summarily reverse the ruling of the court below.

Respectfully submitted,

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 67999

CITY OF CLEVELAND	:	
PLAINTIFF-APPELLEE	:	JOURNAL ENTRY AND OPINION
v.	:	
WILLIAM BREGAR	:	
DEFENDENT-APPELLANT	:	

DATE OF ANNOUNCEMENT OF DECISION:	SEPTEMBER 28, 1995
CHARACTER OF PROCEEDING:	Criminal appeal from Cleveland Municipal Court, Case No. 94-CRB-21369.
JUDGMENT:	AFFIRMED.
DATE OF JOURNALIZATION:	October 10, 1995

APPEARANCES:

For Plaintiff-appellee: Carolyn W. Allen, Chief Prosecuting Attorney, City of Cleveland, Gina M. Villa, Assistant City Prosecutor, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio, 44113.

For Defendant-appellant: James A. Levin, Esq., Levin & Levin, 200 Colonial Arcade, 530 Euclid Avenue, Cleveland, Ohio, 44115; and Raymond Vasvari, Esq., 1300 Bank One Center, 600 Superior Avenue, East, Cleveland, Ohio, 44114-2650.

SWEENEY, JAMES D., J.:

Defendant-appellant William Bregar ("Bregar") appeals from his plea of no contest to a charge of criminal trespass in violation of Cleveland Codified Ordinances 623.04(a).[1] For the reasons adduced below, we affirm.

A review of the record on appeal indicates that prior to the scheduled Cleveland Indians baseball game on the evening of August 2, 1994, Bregar took a hand-lettered sign measuring approximately four feet by five feet upon which was written "A FIELD OF GREED" and stood outside Gate A of Jacob's Field baseball stadium, which is part of the Gateway Economic Development Corporation of Greater Cleveland's ("Gateway") sports complex in

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[1] This section provides in pertinent part:

(a) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another;

(2) Knowingly enter or remain upon the premises of another, the use of which is lawfully restricted to certain persons, purposes, modes or hours, when the offender knows he is in violation of any restriction or is reckless in that regard;

* * *

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of either;

* * *

downtown Cleveland. Gateway is a non-profit corporation created by private individuals and organized pursuant to R.C. 307.696(A)(2) to construct and operate the sports complex for the City of Cleveland. Private stadium security personnel notified Commander Sade, who was employed by Gateway on a part-time basis and supervised the off-duty Cleveland Police officers working as part-time security guards at Gateway events. Commander Sade informed Bregar that his presence at Gate A was obstructing the flow of the pedestrians and escorted Bregar from the Gate A area to a sidewalk location on the Ontario Street[2] side of the Gateway complex, where Bregar could stand with his sign without objection from Gateway Security.

Bregar returned with his sign to the sidewalk location on Ontario street on the night of August 3, 1994, prior to the baseball game that evening and received no complaints from security.

On the evening of August 4, 1994, a date which will live in infamy as being the last day of the strike-shortened 1994 major league baseball season, Bregar returned to Jacob's Field approximately one hour before game-time without a ticket for the game and stood with his sign at a location on a sidewalk, just east of a line of planted trees which run down the middle of the sidewalk along

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[2] Ontario Street is a heavily-travelled four to eight lane north-south thoroughfare which runs through the very heart of downtown Cleveland, past the Gateway complex, connecting the downtown business district with U.S. Interstate 90, which is located just south of the Gateway complex.

Ontario Street[3], adjacent to Gund Arena (which arena is home to the Cleveland Cavaliers basketball team and is also part of the Gateway sports complex) on Ontario Street where that street and a paved access road leading into the Gateway complex intersect at the southwest corner of Gund Arena.[4] Commander Sade noticed that Bregar was located on Gateway private property and was impeding the massive flow of pedestrians, who were forced to walk into the curb lane of Ontario Street in order to avoid Bregar and his sign. Bregar was also being buffeted by the flow of pedestrians who were elbow-to-elbow. Commander Sade asked Bregar to move approximately eight feet to one side, toward Ontario Street and west of the line of trees[5] (toward non-Gateway property) onto a lesser-used portion of the sidewalk adjoining Ontario Street, in order to alleviate the perceived safety hazard to the pedestrians who were streaming into the baseball stadium while at the same time allowing Bregar to fully display his sign. Bregar refused to move. Commander Sade informed Bregar about the law concerning

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[3] The sidewalk running along Ontario Street is approximately eight to twelve feet wide on each side of the tree-planted area. Thus, when one subtracts the width of the appellant's sign from the total width of available sidewalk east of the tree-planted area, one is left with passing room of approximately several feet on each side of the sign. The bottleneck in pedestrian capacity crowd traffic at that point is obvious.

[4] The game that night was a sellout, which amounts to approximately 42,000 fans.

[5] The middle of the line of trees running roughly the length of the sidewalk is the approximate dividing line separating Gateway private property from public property.

criminal trespass and the Gateway policy which prohibits anyone from distributing pamphlets, selling tickets, or doing anything to jeopardize fan safety by impeding traffic flow, but Bregar still refused to move. Bregar produced a small tape recorder and proceeded to record the event. Commander Sade made several more requests for Bregar to move a few feet to improve pedestrian safety, but Bregar rebuffed these requests as well. At that point, Bregar was arrested and charged with criminal trespass under the City's ordinance.[6]

On August 22, 1994, the first pre-trial conference was conducted. At this pre-trial, Bregar gave to the plaintiff-appellee City of Cleveland ("City") a copy of a motion to dismiss, the original of which had been filed just before the start of the conference. The trial court continued the conference until September 29, 1994, so as to allow the City to submit an opposition brief to the motion to dismiss.

The City filed its brief in opposition to dismissal on September 21, 1994.

Immediately prior to the start of the scheduled September 29, 1994 hearing on the motion to dismiss, Bregar

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[6] At an earlier point before this game, Commander Sade confronted another fan on Gateway property who was carrying a twelve-foot replica of Chief Wahoo, the Cleveland Indians mascot, displaying a message concerning the impending baseball strike. Commander Sade informed him that the display was impeding the flow of pedestrians. The fan was permitted to place the sign in an upright position against a wall of Jacobs Field, and after getting a ticket for the game, was allowed to take the sign into the stadium where it was put up and displayed to the public without objection by stadium security.

filed a supplemental memorandum of law in support of his motion to dismiss, arguing that he was arrested while standing on a public sidewalk, which is allegedly a public forum for First Amendment purposes by virtue of the substantial contacts between Gateway, the City and Cuyahoga County. Appellant conceded at the trial court level that Gateway holds title to that area of the sidewalk where he was arrested. The court conducted the hearing on that date and denied the motion to dismiss. At this point, Bregar changed his earlier plea of not guilty to one of no contest. Bregar was then convicted of criminal trespass under the City's ordinance. Bregar was sentenced to a fine of $100 plus court costs, 30 days imprisonment (which were ordered suspended), and one year of inactive probation. Execution of sentence was stayed pending appeal.

This appeal from the adverse ruling on the motion to dismiss presents two assignments of error which will be discussed jointly.

I

THE CLEVELAND MUNICIPAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BECAUSE THE CITY FAILED TO ADDUCE SUFFICIENT EVIDENCE TO ESTABLISH THAT THE SIDEWALK ON WHICH THE APPELLANT WAS ARRESTED SHOULD BE TREATED AS PRIVATE PROPERTY FOR PURPOSES OF FIRST AMENDMENT ANALYSIS.

In this assignment, appellant argues that the Gateway property on which he was arrested, although privately held by Gateway, should be considered as public

property for purposes of a First Amendment analysis. Appellant bases this public property distinction upon his belief that Gateway, as it was formed and is constituted and managed, should be considered a governmental actor by virtue of Gateway's ties to the governments of the City of Cleveland and Cuyahoga County. If that property should be determined to be "public," it is argued that he was then privileged to be on Gateway property, thereby obviating one of the necessary elements for a conviction of the municipal offense of criminal trespass. In order to resolve this issue, a historical retrospective of the birth of Gateway is in order. Fortunately, this retrospective, which was relied upon by the appellee herein at the trial court level, was provided by Judge Aldrich in *Northern Ohio Chapter of Associated Builders & Contractors, Inc. v. Gateway Economic Development Corporation of Greater Cleveland* (N.D.Ohio 1992), No. 1:92-CV-0649, unreported (the trial court ruled that Gateway was a private entity for purposes of the Fourteenth Amendment and application of alleged federal law violations), a copy of which is attached to the appellant's brief.

In *Associated Builders*, the court stated the following at pages 3-8:

> FACTS
>
> A. The Emergence and Role of Gateway
>
> In 1986, the City of Cleveland ("City") joined forces with the Greater Cleveland New Stadium Corporation ("GCNSC") in order to acquire and assemble real property for a site upon which a new sports complex could be constructed. Because of spreading blight in an area of the City known as the Central Market

district, the City agreed to "undertake the public actions necessary to acquire the property interests" in the Central Market district and sell them to the GCNSC. Cleveland City Ord. No. 2581-90 (Oct. 29, 1990). In return, the GCNSC agreed to buy the blighted properties acquired by the City and also to buy other properties in the area in order to assemble a site large enough for the planned sports complex. The proposed sports complex was to include a baseball stadium, basketball arena, and parking garages, and was meant to serve as the new home for one or more local professional athletic teams.

By 1990 most of the land had been assembled. Also by 1990, the GCNSC had announced that it would merge with Gateway and that Gateway would be the surviving entity. Gateway itself had been formed as an Ohio non-profit corporation, pursuant to Ohio Revised Code §1702.01 *et seq*. In addition, Gateway had been formed in contemplation of O.R.C. §307.696 ("the Enabling Act"), which, among other things, provides that an Ohio non-profit corporation may be formed specifically for the purpose of constructing and/or operating a sports complex. The Enabling Act also provides that certain public financing arrangements for the sports complex may be undertaken if an agreement is reached between the non-profit corporation, the board of county commissioners for the county in which the sports complex is to be built, and the municipal corporation in which the sports complex is to be built.

Thus, on October 29, 1990, in order to facilitate the construction of the sports complex, the City of Cleveland passed Ordinance No.

2581.90. This ordinance authorized the Mayor of the City to enter into an agreement with Gateway and with the Cuyahoga County Board of Commissioners ("the County") relating to the financing, construction, ownership, and operation of the sports complex. The ordinance also set out provisions so that the City's agreement with Gateway could be structured to allow for the public financing arrangements contemplated in the Enabling Act. Similarly, on November 5, 1990, the County passed Resolution No. 904626, which approved the County's entry into an agreement with the City and with Gateway for the building and financing of the sports complex and to allow the public financing arrangements contemplated in the Enabling Act.

Accordingly, on November 7, 1990, Gateway, the City, and the County entered into an agreement ("the Tripartite Agreement") to pursue the financing, construction, ownership, and operation of the sports complex. The Tripartite Agreement provides that Gateway will be the builder, owner, and operator of the sports complex itself, and that Gateway is authorized to enter into any leases necessary to operate the sports complex. The City agreed to do whatever might be necessary to allow Gateway to succeed to the rights of GCNSC, so that Gateway will also own the real property upon which the sports complex is built. Any land that is "left over" after the sports complex is built, however, may be purchased by the City at the City's option.

Concerning construction, the three parties agreed that Gateway must file construction plans for review and approval by the City and

County, and must notify the City and County if the construction plans are changed.

As to financing, Gateway is to issue bonds on behalf of the City in an aggregate principal amount not to exceed $200 million to finance construction of the sports complex. The County, having obtained approval from the electorate, levied a tax and pledged the revenue to secure the bonds, as well as to pay half of less of the costs (*sic*) of building the sports complex. Once the bonds are paid off, Gateway must convey ownership of the sports complex to the City, and the City must in turn convey the sports complex to the County if a favorable ruling is obtained from the Internal Revenue Service.

In addition to the provisions of the Tripartite Agreement concerning the financing, construction, ownership, and operation of the sports complex, the Tripartite Agreement also states that Gateway must follow its own Code of Regulations ("Code"). The Code, which is attached to the Tripartite Agreement as an exhibit, lies at the center of this case. The reason that this case turns upon the provisions of the Code is that the Code clearly provides the City and the County with some level of control over Gateway itself. The crucial question is whether the City and the County control Gateway to such an extent that Gateway is not an independent entity, but rather an arm of local government.

B. The Provisions of Gateway's Code

Gateway's Code states that the initial Gateway Board of Trustees ("Board") will consist of nine members, each of whom is to serve for

seven years. The initial Board members are appointed by the County and the City: the County appoints four members, the City appoints four members, and the two political bodies appoint the last member jointly. Also, both the City and County designate one of the four members that it appoints as its "ex officio" member. The two ex officio Board members are voting members and represent the interests of the City or County, respectively, in addition to pursuing the interests of Gateway.

If a Board member position becomes vacant through retirement, removal, or for any other reason, the vacancy is to be filled by the entity that made the initial appointment. After the initial Board members have served their seven year terms, new members are appointed to terms of varying lengths. Again, four members are to be appointed by the City, four by the County, and one by the City and County jointly, and one of the four appointed by each political body is to be an ex officio member.

Board members are subject to removal by either a two-thirds vote of the full membership of the Board, or by unilateral action of the appointing body. Reasons for removal, however, are limited to: "(a) conduct detrimental to the interests of [Gateway], *i.e.*, for any act or omission undertaken with the deliberate intent to cause injury to [Gateway], or (b) for refusal to render reasonable assistance in carrying out [Gateway's] purposes." Code at 7-8. The Code provides that any provision of the Code itself may be amended or repealed by a majority of the Board, except that material changes to the provisions concerning appointment and removal

> of Board members may only be made with the approval of the City and County.
>
> The Code further states that the Board is responsible for the management and control of Gateway's business and property, and that all Board meetings are open to the public. Private meetings may be held on specified subjects, however, such as arranging Gateway security, preparing for public biddings, formulating strategy for court action, and compensating or disciplining employees. The Board elects Gateway's officers, who may then be removed only by a two-thirds vote of the Board. The Board may also confer upon various agents the power to act on behalf of Gateway, including appointment of an Executive Director "who shall be responsible for the day to day operations of [Gateway]." Code at 18. The Chairman of the Board may appoint advisory committees as he sees fit, but must at least appoint these five advisory committees: the Design and Construction Committee; the Personnel Committee; the Development Committee; the Marketing/Public Relations Committee; and the Finance Committee.
>
> Finally, the Code states that Gateway's employees are not public employees – they are not covered by civil service and do not participate in any public employee retirement plan.

In *Cincinnati v. Thompson* (1994), 96 Ohio App.3d 7, the court stated the following:

> Property does not, however, "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp v. Tanner* (1972), 407 U.S. 551, 569, 92 S.Ct.

> 2219, 2229, 33 L.Ed.2d 131, 143. A private property owner cannot be subjected to the First and Fourteenth Amendment rights of others unless the "property * * * assume[s] to some significant degree the functional attributes of public property devoted to public use." *Cent. Hardware Co. v. NLRB* (1972), 407 U.S. 539, 547, 92 S.Ct. 2238, 2243, 33 L.Ed.2d 122, 128; * * * .

Also see *Marsh v. Alabama* (1946), 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265.

Appellant relies on the recent case of *Lebron v. National R.R. Passenger Corp.* (1995), 115 S.Ct. 961, to support his argument that Gateway's ties to the local government are so substantial as to render Gateway a government actor for his individual First Amendment purposes. In *Lebron*, plaintiff's billboard which contained a political statement was rejected by Amtrak for display inside an Amtrak station due to the content of the message. The Court determined that the National Railroad Passenger Corporation, a.k.a. Amtrak, was a government agency for purpose of individual rights guaranteed against the Government by the Constitution because: (1) the Government mandated the creation of the corporation by a special law [the Rail Passenger Service Act of 1970]; (2) the corporation was created to specifically further stated Government objectives [to avert the threatened extinction of passenger rail service in the United States]; and, (3) the Government retained for itself under the creating statute the permanent authority to appoint a majority of the corporation's directors.

At first blush, *Lebron* appears to be controlling. After reviewing the creation of Gateway and applying the facts

of this case, we must conclude that *Lebron* is not controlling and that Gateway is not a government actor or agency for purposes of the First Amendment. The reason for this conclusion is that unlike Amtrak, whose creation was mandated by a special law, Gateway was formed pursuant to R.C. 307.696. This section, R.C. 307.696, was not a directive, but was instead an authorization permitting nonprofit corporations to be formed for the purpose of constructing and/or operating sports complexes. This distinction between mandating and authorizing was succinctly stated by Judge Aldrich in *Associated Builders, supra* at 23-24:

> Whether a non-profit corporation is a political subdivision depends not on whether its formation is mandated or merely authorized; the difference is whether its formation is attributable to private, rather than governmental, action. When a state mandates the creation of an entity, that entity is fairly called a governmental actor. When a state *allows*, instead of *mandates*, a local government to create an entity, that entity, if formed, is still a government actor, since it was a local government that formed it. Only if an entity is *allowed* to be formed by a *private actor* is the entity a nongovernment actor.
>
> * * *. The statute enabling Gateway, however, merely allows local governments to enter into agreements with private entities who may form or not, as they wish, in order to pursue a goal in tandem with that local government. "[Gateway's] contractual relations with . . . political subdivisions . . . do not transform [Gateway] itself into a political subdivision of the State." *Truman Medical Center*, 641 F.2d at 572. (Emphasis in the original.)

See *Truman Medical Center, Inc. v. NLRB* (8th Cir. 1981), 641 F.2d 570.

Additionally, while Gateway has taken on some attributes of a public entity, it lacks others, to-wit:

> Gateway's employees are not regarded as governmental employees; Gateway does not have the power of eminent domain; Gateway does not have the power of subpoena; Gateway lacks the authority to issue tax-exempt bonds; and Gateway does not have the power to tax.

Associated Builders, supra at 23.

Based on the above, we conclude that the trial court determination that Gateway was a private entity was supported by the sufficiency and weight of the evidence.

The first assignment is overruled.

II

THE CLEVELAND MUNICIPAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BECAUSE EVEN IF THE GATEWAY ECONOMIC DEVELOPMENT CORPORATION IS NOT CONSIDERED A STATE ACTOR FOR PURPOSES OF FIRST AMENDMENT ANALYSIS, THE SIDEWALK UPON WHICH THE APPELLANT WAS ARRESTED SHOULD STILL BE CONSIDERED A PUBLIC FORUM.

This argument is premised on appellant's belief that the Gateway portion of the sidewalk is indistinguishable from the City owned portion of the sidewalk, therefore the Gateway portion of the sidewalk should inure the same First Amendment protection to his speech as that

afforded by the nearby public portion of the sidewalk. This argument is unpersuasive in part.

Appellant relies upon two federal cases, both of which involved free speech issues on unrestricted use property owned by private entities, namely, the United States Postal Service and a high school. See *Jacobson v. United States Postal Service* (9th Cir. 1993), 993 F.2d 649, and *Bacon v. Bradley-Bourbonnais High School Dist.* (C.D.Ill. 1989), 707 F.Supp. 1005. It is true that the sidewalk location where appellant was arrested was Gateway private property and that its use was practically unrestricted to pedestrian use, thereby allowing a demonstrator the exercise of free speech thereon. However, the exercise of that free speech is not completely unfettered in an area which is treated as a public fora for purposes of the First Amendment. *Planned Parenthood Assn. of Cincinnati v. Project Jericho* (1990), 52 Ohio St.3d 56; *Cleveland v. Sundermeier* (1989), 48 Ohio App.3d 204. The following was stated in *Planned Parenthood*, at 59:

> The First Amendment guarantees the right to publicly communicate views and to express dissension. Demonstrators may speak, march, picket, leaflet, carry signs or otherwise act to inform or persuade others of their beliefs. These rights, however, do not include the right to imperil public safety or to harass others in exercise of their rights. *United States v. Dickens* (C.A.3, 1982), 695 F.2d 765, 772, certiorari denied (1983), 460 U.S. 1092; *Galella v. Onassis* (S.D.N.Y. 1972), 353 F.Supp. 196, 223, affirmed in part and reversed in part (C.A.2, 1973), 487 F.2d 986. "* * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs

> to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. * * *" *Cox v. Louisiana* (1965), 379 U.S. 536, 554.
>
> The First Amendment does not preclude reasonable restrictions relating to time, place and manner of expression so long as they (1) are content-neutral, (2) are tailored to serve a significant government interest, and (3) leave alternative channels of communication open. (citations omitted.)

In the present case, the evidence disclosed that appellant was imperiling the safety of the pedestrian traffic streaming toward the baseball field. Pedestrian safety is clearly a significant interest to the government and to entities operating a baseball stadium. Appellee's agents did not seek to censor appellant's message based on the content of the speech, they only requested that appellant move his location several feet to one side to improve pedestrian safety. This request to move several feet is a reasonable restraint under the circumstances. Also, appellant had alternate channels of communication open, namely, moving over several feet as requested (which would have alleviated the danger posed to other pedestrians while leaving his sign well within the sight of those pedestrians) or purchasing a ticket to the game and taking the sign into the stadium.

Finally, appellant attempts to argue that the ordinance in question cannot be used as a time/place/manner restriction on free expression because the ordinance

gives unfettered *ad hoc* discretion to the arresting officers to grant or deny access to a public location solely by virtue of their ability to arrest a demonstrator upon the demonstrator refusing to move. This argument overlooks the fact that the arresting officer's discretion is limited, under the facts of this case, to those situations involving persons who refuse to move *and* are creating safety hazards by virtue of their location.

Assignment overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LEO M. SPELLACY, P.J., and
ANN McMANAMON*, J., CONCUR.

(*) Sitting by Assignment:
Ann McManamon, Retired
Judge of the Eighth District
Court of Appeals.

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/s/ James D. Sweeney
JAMES D. SWEENEY
JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORTHERN OHIO CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS, INC., et al.,	)	Case No. 1:92 CV 0649
Plaintiffs,	)	MEMORANDUM AND ORDER
vs.	)	
GATEWAY ECONOMIC DEVELOPMENT CORPORATION OF GREATER CLEVELAND, et al.,	)	
Defendants.	)	

ALDRICH, J.

This action is brought by the Northern Ohio Chapter of Associated Builders and Contractors, Inc. ("ABC"), an association of construction companies that do not have collective bargaining agreements with labor organizations.[1] ABC seeks to enjoin the Gateway Economic Development Corporation of Greater Cleveland ("Gateway") from requiring all construction companies that bid successfully for work on Gateway's construction project to comply with Gateway's Multiple Project Labor Agreement ("the Labor Agreement"). The Labor Agreement requires successful bidders and their subcontractors to

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[1] Also named as plaintiffs are two member construction companies of ABC. In this Memorandum and Order, unless otherwise stated, plaintiffs are referred to collectively as "ABC."

recognize certain local unions as the exclusive representatives of all employees working on the Gateway construction project.

ABC complains that Gateway's requirement that all successful bidders must sign the Labor Agreement violates: 1) the National Labor Relations Act ("NLRA"); 2) the Employee Retirement Income Security Act ("ERISA"); 3) ABC's right to equal protection under the fourteenth amendment; 4) ABC's right to due process under the fourteenth amendment; 5) Ohio's Public Bidding Statute; and 6) several provisions of the Ohio state constitution. ABC moved for a temporary restraining order to enjoin Gateway from enforcing its Labor Agreement.

On March 30, 1992, this Court held a hearing on ABC's motion for a temporary restraining order and denied that motion. The Court also ordered, pursuant to Fed. R. Civ. P. 65(a)(2) and with the parties' consent, that the trial of this action on its merits be consolidated with the hearing for preliminary injunctive relief, so that a ruling on the legal issues at the core of this case could be expedited. Further discussions at this hearing revealed that the dispositive issue in this case is whether Gateway is a governmental actor. Both parties agreed that if Gateway is a governmental actor, then injunctive relief is appropriate, but if Gateway is not a governmental actor, then injunctive relief is not appropriate. The parties have fully briefed the Court on this issue, as well as on the issue of ABC's standing. Gateway has also filed a motion to dismiss. Because the Court has referenced materials outside of the pleadings, however, the Court treats Gateway's motion as one for summary judgment. Fed. R. Civ. P. 12(c). After reviewing the parties' briefs, the Court

concludes that ABC does have standing to bring this case, but that Gateway is not a governmental actor. Therefore, ABC's motion for injunctive relief is denied, and Gateway's motion for summary judgment is granted.

I.

FACTS

A. The Emergence and Role of Gateway

In 1986, the City of Cleveland ("City") joined forces with the Greater Cleveland New Stadium Corporation ("GCNSC") in order to acquire and assemble real property for a site upon which a new sports complex could be constructed. Because of spreading blight in an area of the City known as the Central Market district, the City agreed to "undertake the public actions necessary to acquire the property interests" in the Central Market district and sell them to the GCNSC. Cleveland City Ord. No. 2581-90 (Oct. 29, 1990). In return, the GCNSC agreed to buy the blighted properties acquired by the City and also to buy other properties in the area in order to assemble a site large enough for the planned sports complex. The proposed sports complex was to include a baseball stadium, basketball arena, and parking garages, and was meant to serve as the new home for one or more local professional athletic teams.

By 1990 most of the land had been assembled. Also by 1990, the GCNSC had announced that it would merge with Gateway and that Gateway would be the surviving entity. Gateway itself had been formed as an Ohio nonprofit corporation, pursuant to Ohio Revised Code

§1702.01 *et seq.* In addition, Gateway had been formed in contemplation of O.R.C. §307.696 ("the Enabling Act"), which, among other things, provides that an Ohio non-profit corporation may be formed specifically for the purpose of constructing and/or operating a sports complex. The Enabling Act also provides that certain public financing arrangements for the sports complex may be undertaken if an agreement is reached between the non-profit corporation, the board of county commissioners for the county in which the sports complex is to be built, and the municipal corporation in which the sports complex is to be built.

Thus, on October 29, 1990, in order to facilitate the construction of the sports complex, the City of Cleveland passed Ordinance No. 2581-90. This ordinance authorized the Mayor of the City to enter into an agreement with Gateway and with the Cuyahoga County Board of Commissioners ("the County") relating to the financing, construction, ownership, and operation of the sports complex. The ordinance also set out provisions so that the City's agreement with Gateway could be structured to allow for the public financing arrangements contemplated in the Enabling Act. Similarly, on November 5, 1990, the County passed Resolution No. 904626, which approved the County's entry into an agreement with the City and with Gateway for the building and financing of the sports complex and to allow the public financing arrangements contemplated in the Enabling Act.

Accordingly, on November 7, 1990, Gateway, the City, and the County entered into an agreement ("the Tripartite

Agreement") to pursue the financing, construction, ownership, and operation of the sports complex. The Tripartite Agreement provides that Gateway will be the builder, owner, and operator of the sports complex itself, and that Gateway is authorized to enter into any leases necessary to operate the sports complex. The City agreed to do whatever might be necessary to allow Gateway to succeed to the rights of GCNSC, so that Gateway will also own the real property upon which the sports complex is built. Any land that is "left over" after the sports complex is built, however, may be purchased by the City at the City's option.

Concerning construction, the three parties agreed that Gateway must file construction plans for review and approval by the City and County, and must notify the City and County if the construction plans are changed.

As to financing, Gateway is to issue bonds on behalf of the City in an aggregate principal amount not to exceed $200 million to finance construction of the sports complex. The County, having obtained approval from the electorate, levied a tax and pledged the revenue to secure the bonds, as well as to pay half or less of the costs of building the sports complex. Once the bonds are paid off, Gateway must convey ownership of the sports complex to the City, and the City must in turn convey the sports complex to the County if a favorable ruling is obtained from the Internal Revenue Service.

In addition to the provisions of the Tripartite Agreement concerning the financing, construction, ownership, and operation of the sports complex, the Tripartite Agreement also states that Gateway must follow its own Code

of Regulations ("Code"). The Code, which is attached to the Tripartite Agreement as an exhibit, lies at the center of this case. The reason that this case turns upon the provisions of the Code is that the Code clearly provides the City and the County with some level of control over Gateway itself. The crucial question is whether the City and the County control Gateway to such an extent that Gateway is not an independent entity, but rather an arm of local government.

B. The Provisions of Gateway's Code

Gateway's Code states that the initial Gateway Board of Trustees ("Board") will consist of nine members, each of whom is to serve for seven years. The initial Board members are appointed by the County and the City: the County appoints four members, the City appoints four members, and the two political bodies appoint the last member jointly. Also, both the City and County designate one of the four members that it appoints as its "ex officio" member. The two ex officio Board members are voting members and represent the interests of the City or County, respectively, in addition to pursuing the interests of Gateway.

If a Board member position becomes vacant through retirement, removal, or for any other reason, the vacancy is to be filled by the entity that made the initial appointment. After the initial Board members have served their seven year terms, new members are appointed to terms of varying lengths. Again, four members are to be appointed by the City, four by the County, and one by the City

and County jointly, and one of the four appointed by each political body is to be an ex officio member.

Board members are subject to removal by either a two-thirds vote of the full membership of the Board, or by unilateral action of the appointing body. Reasons for removal, however, are limited to: "(a) conduct detrimental to the interests of [Gateway], *i.e.*, for any act or omission undertaken with the deliberate intent to cause injury to [Gateway], or (b) for refusal to render reasonable assistance in carrying out [Gateway's] purposes." Code at 7-8. The Code provides that any provision of the Code itself may be amended or repealed by a majority of the Board, except that material changes to the provisions concerning appointment and removal of Board members may only be made with the approval of the City and County.

The Code further states that the Board is responsible for the management and control of Gateway's business and property, and that all Board meetings are open to the public. Private meetings may be held on specified subjects, however, such as arranging Gateway security, preparing for public biddings, formulating strategy for court action, and compensating or disciplining employees. The Board elects Gateway's officers, who may then be removed only by a two-thirds vote of the Board. The Board may also confer upon various agents the power to act on behalf of Gateway, including appointment of an Executive Director "who shall be responsible for the day to day operations of [Gateway]." Code at 18. The Chairman of the Board may appoint advisory committees as he sees fit, but must at least appoint these five advisory committees: the Design and Construction Committee; the Personnel Committee; the Development Committee; the

Marketing/Public Relations Committee; and the Finance Committee.

Finally, the Code states that Gateway's employees are not public employees – they are not covered by civil service and do not participate in any public employee retirement plan.

C. The Provisions of Gateway's Labor Agreement

As part of his duties to oversee Gateway's daily operations, Gateway's Executive Director, Tom Chema, entered into a contract on behalf of Gateway with the Cleveland Building and Construction Trades Council ("the Trades Council") and various of the Trades Council's member labor unions ("Unions"). This agreement ("the Labor Agreement") was signed on November 26, 1991, and was ratified by the Board in February of 1992.

Gateway's announced purpose for entering into the Labor Agreement was "to provide and guarantee the efficient, cost effective and uninterrupted construction of" the sports complex in a "cooperative arrangement with the Unions." Labor Agreement at 2. The Labor Agreement states that Gateway will require all contractors working on the sports complex to enter into the existing collective bargaining agreement with the appropriate member union of the Trades Council. The Labor Agreement also authorizes the appropriate union to seek injunctive relief in court against any contractor that: 1) refuses to enter the appropriate collective bargaining agreement; or 2) employs non-union tradesman at the site of the sports complex.

The Labor Agreement further provides that all contractors working on the sports complex must hire workers from the local union hiring halls. Any grievance advanced by a worker on the sports complex must be handled according to the provisions of the applicable collective bargaining agreement. The requirement that contractors abide by the applicable collective bargaining agreement further obligates contractors to comply with the collective bargaining agreement provisions relating to fringe benefit trust funds. If a contractor is 60 days delinquent in making contributions to those trust funds, Gateway must withhold work-in-progress payments owed.

The obvious effect of the Labor Agreement is to prevent any non-union contractors or laborers from working on the sports complex. Simply, the Labor Agreement provides that all workers employed in the construction of the sports complex must be represented by those unions that are signatory to the Labor Agreement. This requirement is made clear at the outset to all contractors that bid for work on the sports complex, since the Labor Agreement is incorporated into the "bid packages" issued by Gateway. The Labor Agreement has a far-reaching impact on the amount of work available to non-union laborers, as the cost of constructing the sports complex is expected to approach or exceed $350 million.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to

> interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

CONCLUSIONS OF LAW

III.

In this case, as in all cases, plaintiffs must clear the initial hurdle of standing. As a prerequisite to this Court's jurisdiction, ABC and its member construction companies must prove that they have suffered a "distinct and palpable injury," rather than a "conjectural" or "abstract" injury. *Allen v. Wright*, 468 U.S. 737, 751, *reh'g denied*, 468 U.S. 1250 (1984). However, Gateway avers that neither ABC nor ABC's member construction companies have suffered such an injury, since no member construction company has ever submitted a bid for a construction contract to Gateway, much less submitted the lowest bid. Gateway notes that the Labor Agreement does not preclude ABC's members from *bidding* on the Gateway project; the Labor Agreement merely requires successful

bidders to observe the "union only" provisions once they are awarded a contract. Therefore, Gateway argues, plaintiffs can point to no injury that calls for remedy through court action. Finally, Gateway argues that ABC lacks associational standing to seek judicial relief for injury to its members.

The Court, however, finds that both ABC and its member construction companies do have standing. Any contractor who submits a bid to Gateway must agree to abide by all of the bid specifications if it is awarded the contract. This includes the specification that the contractor will adhere to the Labor Agreement. To ensure compliance with the bid specifications, each bidder is required to submit with its bid a bid guaranty. The bid guaranty provides that if the bidder is selected by Gateway but then fails to enter into a contract, the bidder must pay Gateway the difference between its bid and the bid submitted by the eventual contract winner. Thus, the requirements that contractors must abide by the Labor Agreement and must submit a bid guaranty have the practical effect of forcing contractors to choose between: 1) bidding on a project, and then acceding to the Labor Agreement if their bid is accepted; 2) bidding on a project, refusing to follow the Labor Agreement if their bid is accepted, and then paying a penalty as dictated by their bid guaranty; or 3) not bidding on any projects.

It is a long standing proposition that the law never requires a vain or useless act. *Cary v. Curtis*, 44 U.S. 236 (1845). Here, the submission of a bid to Gateway by a non-union contractor would clearly be a vain act, since if Gateway accepts the bid, the contractor is left only with the choices of following the Labor Agreement or instead

refusing to follow the Labor Agreement and paying a penalty. The choice of remaining non-union is not available. The practical effect of making compulsory the adoption of the Labor Agreement by successful bidders is to deprive non-union contractors of the opportunity to fairly compete for such contracts. At least one plaintiff has attested that if the Labor Agreement requirement is removed, it would seek work on the Gateway project. To insist that this plaintiff must actually submit a bid in order to acquire standing is to insist that the plaintiff engage in a vain act.

In *Associated Builders & Contractors of Massachusetts/ Rhode Island, Inc. v. Massachusetts Water Resources Authority*, 935 F.2d 345 (1st Cir. 1991), *petition for cert. pending*, 112 S. Ct. 293 (1991) (hereinafter "*MWRA*"), a suit was brought by plaintiff contractors challenging a union-only agreement adopted by the state in conjunction with construction in Boston Harbor. Although the contractors in *MWRA* had not bid on any construction contract, the First Circuit necessarily found that the contractors had standing when it ordered the district court to grant injunctive relief. Concerning the requirement that plaintiffs suffer an injury, the Circuit wrote: "The state not only mandates that a labor agreement be reached before a bid is awarded, but dictates with whom that agreement is going to be entered, and specifies what its contents shall be. For all intents and purposes, the state here eliminates the bargaining process altogether." *Id.* at 353.

In the instant case, as in *MWRA*, contractors must agree to abide by the Labor Agreement (or pay a penalty) before a bid is awarded, and the Labor Agreement "dictates with whom that agreement is going to be entered,

and specifies what its contents shall be." *Id.* The injury that is alleged by ABC's member contractors, therefore, is the deprivation of their opportunity to compete for Gateway's contracts. This injury is sufficient to confer standing. *See also, Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1407 (9th Cir. 1991) (petition for cert. pending) (concerning standing of plaintiffs, who had not bid on construction projects because of minority business set-asides, the court stated: "the chill alleged by [plaintiff contractors] to result from the ordinance, because the ordinance is compulsory in nature, must also be deemed a legally cognizable injury."); *Associated Contractors v. New Haven*, 130 F.R.D. 4, 7 (D. Conn. 1990) (although plaintiff contractors had not bid on any project because of minority set-asides, "[t]he denial of the opportunity to compete for such work constitutes the requisite 'injury in fact.' "). Since plaintiff contractors can show a "personal injury which is fairly traceable to the defendant's [allegedly] illegal conduct and which is likely to be addressed by judicial relief," *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1016 (6th Cir. 1989) (citing *Allen v. Wright*, 468 U.S. 737 (1984)), Gateway's challenge that ABC's member construction companies do not have standing must be rejected.

Gateway also argues that ABC does not have standing as an association to represent its members. This argument must also be rejected. In determining whether an organization has representational standing to sue on behalf of its members, the Supreme Court has stated:

> The organization must establish that: (a) its members would otherwise have standing to sue

> in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

ABC meets all three prongs of this test. The first prong, that ABC's member contractors have standing in their own right, has already been established. The second prong is also met. ABC is a trade association composed of over 300 construction contractors whose workers have chosen not to affiliate with any union. ABC exists, among other reasons, "to foster, promote, and protect the common interests of its member contractors and subcontractors" and to "promote the merit shop (i.e. non-union) philosophy of open and fair competitive bidding throughout the construction industry." Plaintiff's memorandum on standing at 14. The interests that ABC seeks to protect through this lawsuit, therefore, are clearly germane to ABC's purpose. *See also Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1406 (9th Cir. 1991) (petition for cert. pending) ("the interest of [plaintiff contractor association] in preserving favorable conditions for bidding by its members is clearly germane to the organization's purpose").

As for the third prong, plaintiffs in this case are seeking only declaratory and injunctive relief. As such, "the claims proffered and relief requested do not demand individualized proof on the part of [ABC's] members." *Id.* at 1408. Since "the request for declaratory and injunctive relief [does not] require[ ] individualized proof [this matter is] properly resolved in a group context." *UAW v.*

Brock, 477 U.S. 274, 287 (1986). *See also Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1017 (6th Cir. 1989) (lawsuit does "not require participation by the individual members because any injunctive relief granted would inure to the benefit of all members of the association actually injured."). Accordingly, the Court finds that ABC also has standing in this case to pursue a remedy for the harm allegedly suffered by its members.

IV.

Since the plaintiffs have satisfied the threshold issue of standing, the Court must now address the merits of plaintiff's substantive claims. As mentioned above, ABC claims that Gateway's requirement that all successful bidders must sign the Labor Agreement violates: 1) the NLRA; 2) ERISA; 3) ABC's right to equal protection under the fourteenth amendment; 4) ABC's right to due process under the fourteenth amendment; 5) Ohio's Public Bidding Statute; and 6) several provisions of the Ohio state constitution.

The first four of these claims are based on federal law. For these federal claims to be valid, the actions taken by Gateway must be actions fairly imputed to the state; if Gateway is a private entity, no violation of federal law can be made out. For example, the fourteenth amendment declares that "*No State* shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1 (emphasis added). Thus, to prevail under its fourteenth amendment claims, ABC must prove that Gateway is a

state actor. If Gateway is a private actor, the fourteenth amendment does not apply to prohibit the Labor Agreement.

Similarly, the NLRA states that employers may not enter into agreements that force all employees to become signatory to a union agreement, unless the employer is "engaged primarily in the building and construction industry" and the union has as its members "building and construction employees." 29 U.S.C. §158(f). In other words, the NLRA proclaims that employers may not enter union-only agreements except in the building and construction industry. There is an exception to this exception, however. The NLRA also states that "[t]he term 'employer' . . . shall not include . . . *any State or political subdivision thereof.* . . . " 29 U.S.C. §152(2) (emphasis added). Thus, a State or political subdivision is not allowed to enter into a union only agreement, even if the State or political subdivision is employing laborers for purposes of building and construction. In sum, Gateway does not violate the NLRA if it is a private entity, but may violate the NLRA if it is a "political subdivision."

Finally, ERISA states that its provisions "shall supersede any and all *State laws* insofar as they may or hereafter relate to any employee benefit plan. . . . " 29 U.S.C. §1144(a) (emphasis added). ERISA defines "State law" to include "all laws, decisions, rules, regulations, *or other State action* having the effect of law, of any State." 29 U.S.C. §1144(c) (emphasis added). Thus, once again, if Gateway is a state actor, ERISA may apply to prohibit the Labor Agreement. On the other hand, if Gateway is a private actor, ERISA does not preempt the Labor Agreement.

Accordingly, each of ABC's federal claims turns on the central and decisive issue of whether Gateway is a private actor. This issue is addressed in the following section.

V.

It is conceivable that Gateway could be found to be a state actor for purposes of some of ABC's claims but not others – for instance, Gateway could be found to be a state actor under ERISA, but not for the fourteenth amendment. However, the Court finds this extremely unlikely, and the parties have not suggested that this scenario could occur. Accordingly, the Court's analysis of Gateway's status begins and ends with the test for what is a "political subdivision" under the NLRA. The Court uses this test because all parties to this lawsuit agree that the central claim in this case is ABC's NLRA claim, and because the parties have heavily focused their arguments on Gateway's status under the NLRA.

The Supreme Court has set forth a two-part test of what constitutes a political subdivision under the NLRA. Political subdivisions are defined as

> entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.

NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 604-05 (1971) (hereinafter, "*Hawkins County*") The analysis suggested by *Hawkins*

County is disjunctive – an entity is a political subdivision if it meets either of the two alternative prongs of this test.

A. Analysis Of Gateway Under The First Prong of Hawkins County

The first prong of the *Hawkins County* test states that an entity is a political subdivision if it was "created directly by the state, so as to constitute [a] department[ ] or [an] administrative arm[ ] of the government." *Hawkins County*, 402 U.S at 604. Here, the existence of Gateway was enabled by an Ohio statute allowing non-profit corporations to be formed for the purposes of

> operating or constructing and operating a sports facility in the county and . . . for the additional purposes of conducting redevelopment and economic development activities within the host municipal corporation.

O.R.C. 307.696(A)(2). But the mere fact that Gateway is organized under Ohio's non-profit corporation law to take advantage of the provisions of a statute allowing it to pursue certain ends does not mean that Gateway is a political subdivision under prong one of the *Hawkins County* test.

In *Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570 (8th Cir. 1981), the court found that a corporation organized under the general non-profit corporation law of Missouri was not a political subdivision, even though the corporation "was organized in 1962 at the instance of the City of Kansas City, Missouri." *Id.* at 572. In fact, the

corporation at issue in *Truman Medical Center* was organized to run a local hospital for the Kansas City Department of Health, and to "assume[ ] the statutory responsibilities of Kansas City and Jackson County, Missouri." *Id.* Still, the non-profit corporation in *Truman Medical Center* was found not to be a political subdivision because "[n]o special act of the state legislature or any public official was *required* to create it." *Id.* (emphasis added).

The Tenth Circuit came to a similar conclusion in *Jefferson County Community Center for Developmental Disabilities v. NLRB*, 737 F.2d 122 (10th Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984). In that case, a Colorado non-profit corporation was operating to provide services to mentally retarded citizens. The corporation was created solely and specifically so that the state could take advantage of a statutory scheme allowing the state to purchase such services. The corporation was deemed not to be a political subdivision. however, because "[n]o special legislative act brought it into existence." *Id.* at 124.

Gateway was organized under the general non-profit corporation law of Ohio. It was organized to construct and operate the sports complex for the City, just as its counterpart in *Truman Medical Center* was organized to run a hospital for the city. Like the corporations in *Truman Medical Center* and *Jefferson County*, Gateway was created not through a special legislative act, but by private individuals. And Gateway was formed specifically so that the City and County could take advantage of a statutory scheme to obtain Gateway's services, as was the corporation in *Jefferson County*. Thus, the non-profit corporations in *Truman Medical Center, Jefferson County*, and

this case are all not political subdivisions, because in none of these cases did the state *mandate* their formation. The Enabling Act is an authorization and not a directive. Therefore, it cannot be said that Gateway was "created directly by the state, so as to constitute [a] department[ ] or [an] administrative arm[ ] of the government." *Id.*

ABC argues that certain characteristics of Gateway prove that it is, indeed, a political subdivision. For instance, in *Hawkins County*, the Supreme Court found that a utility district was a political subdivision because the district: 1) had eminent domain powers; 2) was exempt from federal, state, and municipal taxes; 3) was subject to public records laws; 4) had the power of subpoena; 5) had officers who received nominal compensation; 6) had officers who were appointed by public officials and were subject to removal by public officials; and 7) was statutorily defined to be a "municipality." *Hawkins County*, 402 U.S. at 606-09. ABC points out that Gateway, too, is: 1) exempt from federal, state, and municipal taxation; 2) subject to Ohio's open meeting law; and 3) run by trustees who are appointed, and subject to removal, by elected public officials.

That Gateway shares some characteristics with public entities, however, does not alone make it a political subdivision. Of the characteristics listed in *Hawkins County*, none are controlling, with perhaps the exception that the utility district was defined to be a municipality. For example, the nonprofit organization in Truman Medical Center was also exempt from federal taxation, but was found to be a private entity. Moreover, while Gateway does exhibit some characteristics of a public entity, it lacks others: Gateway's employees are not regarded as

governmental employees; Gateway does not have the power of eminent domain; Gateway does not have the power to subpoena; Gateway lacks the authority to issue tax-exempt bonds; and Gateway does not have the power to tax. Thus, looking at these characteristics alone does not support ABC's position.

Finally, ABC points out that the Sixth Circuit has ruled that a regional transit authority is a political subdivision even though the statute under which the transit authority was formed did not *mandate* its existence. In *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266 (6th Cir. 1990), the transit authority was declared a political subdivision "because it was created by the state pursuant to Ohio Rev. Code §306.32 which *empowers* counties, municipal corporations, and townships to create transit authorities." *Id.* at 271 (emphasis added).

However, ABC misconstrues the logic behind the distinction between an entity created by state mandate as opposed to one created by private action, authorized by the state. Whether a non-profit corporation is a political subdivision depends not on whether its formation is mandated or merely authorized; the difference is whether its formation is attributable to private, rather than governmental, action. When a state mandates the creation of an entity, that entity is fairly called a governmental actor. When a state *allows*, instead of *mandates*, a local government to create an entity, that entity, if formed, is still a governmental actor, since it was a local government that formed it. Only if an entity is *allowed* to be formed by a *private actor* is the entity a non-governmental actor.

In *Moir* the statute empowered *local governments* to create transit authorities; therefore, any transit authorities that were created are arms of those local governments. The statute enabling Gateway, however, merely allows local governments to enter into agreements with private entities who may form or not, as they wish, in order to pursue a goal in tandem with that local government. "[Gateway's] contractual relations with . . . political subdivisions . . . do not transform [Gateway] itself into a political subdivision of the State." *Truman Medical Center*, 641 F.2d at 572.

Gateway is working so closely with the City and the County that it has taken on some characteristics of a governmental actor. These characteristics alone, however, do not mean that Gateway was "created directly by the state, so as to constitute [a] department[ ] or [an] administrative arm[ ] of the government." *Hawkins County*, 402 U.S at 604. Because the Court finds that Gateway was not created directly by the state and does not constitute a department or administrative arm of any government, Gateway cannot be deemed to be a political subdivision under the first prong of the *Hawkins County* test.

B. Analysis Of Gateway Under The Second Prong of *Hawkins County*

The second prong of the *Hawkins County* test states that an entity is a political subdivision if it was "administered by individuals who are responsible to public officials or to the general electorate." *Hawkins County*, 402 U.S. at 604-05. This test presents a more difficult challenge to Gateway because of the procedure by which

Gateway's Board of Trustees is appointed and removed. As noted above, all nine Board members are appointed "by the Board of County Commissioners of Cuyahoga County and the Mayor of the City of Cleveland." Code at 1. The Mayor's appointments must "be made with the concurrence of the Council for the City." *Id* at 4. Removal of members of the Board who are not ex officio may be achieved through two methods: 1) a two thirds vote of the full membership of the Board; or 2) by unilateral action of the appointing party. Removal of ex officio Board members and of those Gateway officers whom the Board has appointed may only be accomplished through the first of these two methods. Removal is allowed only for cause, defined as "(a) conduct detrimental to the interests of [Gateway], *i.e.*, for any act or omission undertaken with the deliberate intent to cause injury to [Gateway], or (b) for refusal to render reasonable assistance in carrying out [Gateway's] purposes." Code at 8.

It is true that, under the second prong of the *Hawkins County* test, courts routinely examine whether the individuals who run an organization are elected or appointed by the state, and whether they may be removed by the state. *E.g., NLRB v. Princeton Memorial Hospital*, 939 F.2d 174 (4th Cir. 1991); *St. Jude Industrial Park Board v. NLRB*, 760 F.2d 223 (8th Cir. 1985); *Jefferson County Community Center v. NLRB*, 737 F.2d 122 (10th Cir. 1984), *cert denied*, 469 U.S. 1086 (1984); *Crestline Memorial Hospital Assoc., Inc. v. NLRB*, 668 F.2d 243 (6th Cir. 1982). In fact, one court has held that when a mere majority of an organization's board is elected or appointed by the state, the state "clearly exercises control over" the organization, and thus the organization is a political subdivision. *University*

of Vermont, 297 NLRB No. 42 (Nov. 21, 1989). Here, of course, Gateway's entire Board is appointed by local governments, not just a majority of the Board.

However, courts have also noted that simply because the board members of an organization are *chosen* by and accountable to public officials does not mean that the organization is a political subdivision. It is only if the organization's board is accountable to public officials *by law* that the organization becomes a political subdivision; if the organization has voluntarily *chosen* to be held accountable to public officials, it does not lose its status as a private employer. For instance, in *Jefferson County Community Center v. NLRB*, 737 F.2d 122 (10th Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984), seven of the Community Center's directors were appointed by public agencies. The court noted, however, that

> [t]he composition of the Center's Board of Directors is established not by statute but by the by-laws of the corporation, which are subject to amendment by a two-thirds vote of the Board. Thus, to the extent that Directors are accountable to public officials, they are accountable by choice rather than by law. Such an arrangement does not qualify the Center as a political subdivision under the [second prong of the *Hawkins County* test].

Id. at 125 n.3 (citing *Crestline Memorial Hospital Assoc., Inc. v. NLRB*, 668 F.2d 243 (6th Cir. 1982)).

In this case, there is no statutory requirement that Gateway's Board members be appointed by the City and County. Rather, Gateway voluntarily adopted bylaws

calling for the Board's initial composition to be determined by the City and County, and Gateway then contracted to continue this selection process as set out in the Tripartite Agreement. That Gateway's Board members are appointed and may be removed by public officials is a matter of Gateway's choice, not of governmental mandate.

Moreover, it is worth noting that once appointed, Gateway's initial Board members are in no way beholden to the public officials who appointed them. Board members enjoy a seven year term, which may be cut short only by voluntary resignation, retirement, death, or removal "for cause." Cause is limited to conduct detrimental to the interests of *Gateway*, or for refusal to render reasonable assistance in carrying out *Gateway's* purposes; with the exception of the two ex officio members, Board members may not be removed by the appointing authority for actions detrimental to the interests of the appointing authority itself. Code at 8. Thus, while Gateway's Board members may be accountable to public officials, their accountability only ensures the advancement of Gateway's interests, not the interests of the appointing authorities.

ABC notes that other courts have rejected this distinction between a board member's accountability to public officials by law and accountability to public officials by choice. In *NLRB v. Princeton Memorial Hospital*, 939 F.2d 174 (4th Cir. 1991), the court stated:

> At least two circuits have indicated in passing that there may be some distinction between responsibility imposed externally by force of law and responsibility that may arise due to

> internal decision. . . . (citing *Crestline Memorial Hospital* and *Jefferson County Community Center*).
>
> We cannot accept this distinction as a meaningful one based upon the record before us. The language of the statute and the legislative history do not contain any hint that such a distinction was within the contemplation of Congress. Instead, the "political subdivision" exemption reflects Congress's intention of precluding the NLRB's involvement in the employment relationships between state and local governments on the one hand, and their employees on the other. That goal requires that the exemption be applied regardless of the enabling source of the governmental authority.

Id. at 178.

This Court is not persuaded by the Fourth Circuit's opinion in *Princeton Memorial Hospital*. The Fourth Circuit states what the Sixth Circuit "indicated in passing" that the distinction between accountability by law and accountability by choice "may be" significant. However, this Court does not read the Sixth Circuit's distinction as having been made so lightly. On the contrary, this distinction seems to be the pivot upon which the Sixth Circuit based its holding. In determining whether a hospital corporation came under the second prong of the *Hawkins County* test, the Sixth Circuit stated that the corporation's

> Directors are not responsible *by law* to the electorate since no city or local laws govern the formation or operation of the Hospital. Rather, the decision to include all citizens as members of the Hospital corporation [arguably making the Hospital "responsible to the electorate"] is entirely the corporation's (deriving solely from

> the corporate constitution) and is subject to change.

Crestline Memorial Hospital Assoc., Inc. v. NLRB, 668 F.2d 243, 245 (6th Cir. 1982) (emphasis in original).

While the Tenth Circuit may have seized upon the distinction between accountability by law and accountability by choice merely "in passing" when it referred to *Crestline* in its *Jefferson County Community Center* opinion, the Sixth Circuit directly relied upon this distinction. Moreover, even if the Tenth Circuit's reliance on the distinction was merely supplementary, the Tenth Circuit nonetheless accepted this distinction as meaningful, legitimate, and appropriate. Thus, this Court sees no reason to abandon Sixth Circuit precedent in favor of the Fourth Circuit's approach. As applied to this case, Gateway *chose to* have its Board members appointed and removable by the City and County; nowhere is there any statutory requirement that Gateway do so. Because Gateway's Board is accountable to the City and County by choice (to the extent it is truly accountable to the City and County at all), and not by law, Gateway is not "administered by individuals who are responsible to public officials or to the general electorate." *Hawkins County*, 402 U.S. at 604-05. As such, Gateway is not a political subdivision under the second prong of the *Hawkins County* test, and its entry into the Labor Agreement does not violate the NLRA.

VI.

Under both prongs of the *Hawkins County* test, this Court finds that Gateway is a private actor for purposes

of the NLRA. Because the *Hawkins County* test applies equally well to determine whether Gateway is a private actor for the purposes of ERISA and the fourteenth amendment, the Court further finds that Gateway is not a state actor under ABC's other federal claims, either. Thus, none of ABC's federal law claims can be sustained. Accordingly, Gateway's motion to dismiss ABC's federal claims is granted.

The remainder of ABC's complaint contains supplemental state law claims against Gateway. However, jurisdiction in this case is based solely upon the existence of a federal question, and this Court has jurisdiction over state law claims only insofar as they are "so related to claims in the action within [the Court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a). A district court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction." *Id.* at §1367(c)(3). "[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Williams v. City of River Rouge*, 909 F.2d 151, 157 (6th Cir. 1990). Accordingly, this Court, in its discretion, orders the supplemental state law claims dismissed, without prejudice, for lack of a substantial federal claim.

VII.

In summary, Gateway's motion for summary judgment on ABC's federal law claims is granted, as there is

no genuine issue as to any material fact and Gateway is entitled to judgment as a matter of law. ABC's pendent state law claims are dismissed without prejudice. All other outstanding motions are denied as moot. Pursuant to Fed. R. Civ. P. 65(a)(2), this is a final and appealable order.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT
JUDGE

THE SUPREME COURT OF OHIO

1996 TERM

To wit: March 6, 1996

City of Cleveland, Appellee,	:	
	:	Case No. 95-2403
v.	:	
	:	ENTRY
William Bregar, Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Raymond Vasvari.

(Cuyahoga County Court of Appeals; No. 67999)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Ohio Revised Code Annotated
Section 307.696 (Anderson 1995)

307.696 Agreement to construct and operate a county sports facility.

(A) As used in this section:

(1) "County taxes" means taxes levied by the county pursuant to sections 307.697, 4301.421 5743.024 and 5743.323 of the Revised Code.

(2) "Corporation" means a nonprofit corporation that is organized under the laws of this state for the purposes of operating or constructing and operating a sports facility in the county and that may also be organized under the laws of this state for the additional purposes of conducting redevelopment and economic development activities within the host municipal corporation.

(3) "Sports Facility" means a sports facility that is intended to house major league professional athletic teams, including a domed stadium, together with all parking facilities, walkways, and other auxiliary facilities, real and personal property, property rights, easements, and interests that may be appropriate for, or used in connection with, the operation of the facility.

(4) "Construction" includes, but is not limited to, providing fixtures, furnishings, and equipment.

(5) "Debt service charges" means the interest, principal, premium, if any, carrying and redemption charges, and expenses on bonds issued by either the county or the corporation to:

(a) construct a sports facility or provide for related redevelopment or economic development as provided in this section;

(b) Acquire real and personal property, property rights, easements, or interests that may be appropriate for, or used in connection with, the operation of the facility; and

(c) Make site improvements to real property, including, but not limited to, demolition, excavation, and installation of footers, pilings, and foundations.

(6) "Host municipal corporation" means the municipal corporation within the boundaries of which the sports facility is located, and with which a national football league, major league baseball, or national basketball association sports franchise is associated on the effective date of this amendment.

(B) A board of county commissioners of a county that levies a tax under section 307.697, 4301.421 or 5743.024 of the Revised Code may enter into an agreement with a corporation operating in the county, and, if there is a host municipal corporation all or a part of which is located in the county, shall enter into an agreement with a corporation operating in the county and the host municipal corporation, under which:

(1)(a) The corporation agrees to construct and operate a sports facility in the county and to pledge and contribute all or any part of the revenues derived from its operation, as specified in the agreement, for the purposes described in division (C)(1) of this section; and

(b) The board agrees to levy county taxes and pledge and contribute any part or all of the revenues therefrom, as specified in the agreement, for the purposes described in division (C)(1) of this section; or

(2)(a) The corporation agrees to operate a sports facility constructed by the county and to pledge and contribute all or any part of the revenues derived from its operation, as specified in the agreement, for the purposes described in division (C)(2) of this section; and

(b) The board agrees to issue revenue bonds of the county, use the proceeds from the sale of the bonds to construct a sports facility in the county, and to levy county taxes and pledge and contribute all or any part of the revenues therefrom, as specified in the agreement, for the purposes described in division (C)(2) of this section; and, if applicable

(3) The host municipal corporation agrees to expend the unused pledges and contributions and surplus revenues as described in divisions (C)(1) and (2) of this section for redevelopment and economic development purposes related to the sports facility.

(C)(1) The primary purpose of the pledges and contributions described in division (B)(1) of this section is payment of debt service charges. To the extent the pledges and contributions are not used by the county or corporation for payment of debt service charges, the county or corporation, pursuant to the agreement provided for in division (B) of this section, shall provide the unused pledges and contributions, together with surplus revenues of the sports facility not needed for debt service charges or the operation and maintenance of the sports

facility, to the host municipal corporation, or a nonprofit corporation, which may be the corporation acting on behalf of the host municipal corporation, for redevelopment and economic development purposes related to the sports facility. If the county taxes are also levied for the purpose of making permanent improvements, the agreement shall include a schedule of annual pledges and contributions by the county for the payment of debt service charges. The county's pledge and contribution provided for in the agreement shall be for the period stated in the agreement but not to exceed twenty years. The agreement shall provide that any such bonds and notes shall be secured by a trust agreement between the corporation or other bond issuer and a corporate trustee that is a trust company or bank having the powers of a trust company within or without the state, and the trust agreement shall pledge or assign to the retirement of the bonds or notes, all moneys paid by the county for that purpose under this section. A county tax, all or any part of the revenues from which are pledged under an agreement entered into by a board of county commissioners under this section shall not be subject to diminution by initiative or referendum, or diminution by statute, unless provision is made therein for an adequate substitute therefor reasonably satisfactory to the trustee under the trust agreement that secures the bonds and notes.

(2) The primary purpose of the pledges and contributions described in division (B)(2) of this section is payment of debt service charges. To the extent the pledges and contributions are not used by the county for payment of debt service charges, the county or corporation, pursuant to the agreement provided for in division

(B) of this section, shall provide the unused pledges and contributions, together with surplus revenues of the sports facility not needed for debt service charges or the operation and maintenance of the sports facility, to the host municipal corporation, or a nonprofit corporation, which may be the corporation, acting on behalf of the host municipal corporation, for redevelopment and economic development purposes related to the sports facility. The corporation's pledge and contribution provided for in the agreement shall be until all of the bonds issued for the construction of the facility have been retired.

(D) A pledge of money by a county under this section shall not be indebtedness of the county for purposes of Chapter 133 of the Revised Code.

(E) If the terms of the agreement so provide, the board of county commissioners may acquire, make site improvements to, including, but not limited to, demolition, excavation, and installation of footers, pilings, and foundations, and lease real property for the sports facility to a corporation that constructs a sports facility under division (B)(1) of this section. The agreement shall specify the term, which shall not exceed thirty years and shall be on such terms as are set forth in the agreement. The purchase, improvement, and lease may be the subject of an agreement between the county and the municipal corporation located within the county pursuant to section 153.61 or 307.15 of the Revised Code, and are not subject to the limitations of sections 307.02 and 307.09 of the Revised Code.

(F) The corporation shall not enter into any construction contract or contract for the purchase of services

for use in connection with the construction of a sports facility prior to the corporation's adoption and implementation of a policy on the set aside of contracts for bidding by or award to minority business enterprises, as defined in division (E)(1) of section 122.71 of the Revised Code. Sections 4115.03 to 4115.16 of the Revised Code apply to a sports facility constructed under this section.

(G) Not more than one-half of the total costs, including debt service charges and cost of operation, of a project undertaken pursuant to an agreement entered into under division (B) of this section shall be paid from county taxes. Nothing in this section authorizes the use of revenues from county taxes or proceeds from the sale of bonds issued by the board of county commissioners for payment of costs of operation of a sports facility.

(1990 S 188, eff. 3-20-90; 1986 H 583)

Cleveland Codified Ordinance

623.04 Criminal Trespass

(a) No person, without privilege to do so, shall do any of the following;

(1) Knowingly enter or remain on the land or premises of another;

(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes or hours, when the offender knows he is in violation of any such restriction or is reckless in that regard.

(3) Recklessly enter or remain on the land or unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified to do so by the owner or occupant, or the agent or servant of either;

(5) Knowingly enter or remain in any vacant and vandalized building or structure, including, but not limited to, a formerly occupied residential dwelling or dwelling unit, without having on his person the written permission of the owner of such structure granting permission to be in any such building or structure. This paragraph does not apply to governmental officers or employees when carrying out a lawful governmental function.

(b) It is no defense to a charge under this section that the land or premises involved was owned, controlled or in custody of a public agency.

(c) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved when such authorization was secured by deception.

(d) Whoever violates paragraphs (a)(1), (2), (3) and (4) of this section is guilty of criminal trespass, a misdemeanor of the fourth degree, and shall be imprisoned for not less than six months or not more than one year or fined not less than five hundred dollars ($500.00) or not more than one thousand dollars ($1,000), or both.

(e) Whoever violates subsection (a)(5) is guilty of trespassing on a vacant and vandalized building, a misdemeanor of the first degree.

(f) As used in this section, "land or premises" includes any land, building, structure of place belonging to, controlled by or in custody of another, and any separate enclosure or room, or portion thereof. (Ord. No. 1160-82. Passed 11-22-82, eff. 11-26-82)

Supreme Court, U.S.
FILED
JUL 3 1996
CLERK

(2)

No. 95-1965

In The

Supreme Court of the United States

October Term, 1995

WILLIAM BREGAR,

Petitioner,

vs.

THE CITY OF CLEVELAND,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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23pp

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STATEMENT OF THE CASE

Prior to a Cleveland Indians baseball game on the evening of August 2, 1994, at approximately 6:00 p.m., the Petitioner stood outside of Gate A of Jacobs' Field baseball stadium, home of the Cleveland Indians, holding a sign measuring four feet by five feet with the words "A FIELD OF GREED." The Petitioner stood on private property, which is part of the Gateway Economic Development Corporation of Greater Cleveland's sports complex ("Gateway"). Gateway is a non-profit corporation created by private individuals and organized pursuant to Ohio Revised Code Section 307.696(A)(2).

Commander Sade, an off-duty Cleveland Police Officer working part-time in the capacity of Gateway security, approached the Petitioner as a result of a complaint from other security personnel. All security personnel, including off-duty Cleveland police officers, contract with and are paid by Gateway Corporation. Further, Gateway Corporation provided a four-hour training session for all security personnel to explain Gateway's policy concerning traffic and pedestrian control. Acting upon the complaint, Commander Sade informed the Petitioner that he was obstructing the flow of pedestrians going to the game. Commander Sade informed the Petitioner that he was free to display his sign if he moved over to the Ontario Street side of the stadium. Although he was argumentative, the Petitioner complied with Sade's request. He moved over to a safer place where he would not obstruct the flow of traffic.

The following evening, August 3, 1994, the Petitioner again displayed his sign in the safe area and did not impede the flow of traffic.

On the evening of August 4, 1994, the last game of the strike-shortened season, the Cleveland Indians game sold-out. Approximately 42,000 fans converged on the area for the game. Other people were protesting the impending baseball strike on that evening, including a man with a ten to twelve foot replica of Chief Wahoo, the Indians' mascot. The man was informed that he could not place his sign out on the open wall because of the volume of people walking by. The man, however, was allowed to take the sign into the stadium and display it there.

That same evening, the Petitioner returned to Jacobs' Field one hour prior to game-time. He did not have a ticket for the game. Commander Sade received another complaint that the Petitioner was on Gateway's private property and that his sign was impeding the flow of traffic forcing pedestrians, walking elbow-to-elbow, to walk into the curb lane of Ontario Street. Commander Sade, along with another police officer and a security supervisor, approached the Petitioner and informed him that he was creating a safety hazard by forcing fans to walk around him and into the busy street. Sade asked the Petitioner to move approximately eight feet to one side, where he could display his sign. In fact, more fans would have seen his message from the new position. The Petitioner refused to move the few feet.

Commander Sade then read the Petitioner the Criminal Trespass ordinance and informed him of Gateway

policy which prohibits anyone from distributing pamphlets, selling tickets, or doing anything which jeopardizes the fans' safety by impeding the flow of traffic. The Petitioner still refused to move. The Petitioner then pulled out a tape recorder and recorded the entire incident. Commander Sade asked the Defendant several more times to simply move a few feet over for pedestrian safety. Again, he refused and was arrested for Criminal Trespass.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. There is no First Amendment issue as Gateway is a private corporation and had a right to remove the Petitioner from its private property.

The Petitioner was on Gateway Corporation's private property at the time of his arrest at Jacobs' Field, thus he was not subject to the full protection of the First Amendment. Gateway Corporation is a private entity which reserves all of the rights and privileges of a private property owner. The United States Supreme Court has recognized that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. *Lloyd Corp. v. Tanner,* 407 U.S. 551, 570 (1972). Rights can collide when private property assumes some characteristics of public property. The Supreme Court, however, stated that private property does not "lose its private character merely because the public is generally

invited to use if for designated purposes." *Lloyd Corp.*, 407 U.S. at 569.

A. Gateway Corporation is an independent, private entity, not an extension of local government.

From Gateway's inception, state and federal courts have been called upon to decide whether Gateway is an independent private entity or an arm of local government. The Eighth District Court of Appeals of Ohio (Eighth District), in the present case, found Gateway Corporation to be a private entity. In its decision, the Eighth District relied upon *N. Ohio Chapter of Associated Builders and Contractors, Inc. v. Gateway Economic Dev. Corp. of Greater Cleveland*, No. 1:92 C.V. 0649 (1992, N.D. Ohio) (Pet. App. 2-49). In *Associated Builders*, the Federal District Court applied the two-pronged test announced by the United States Supreme Court in *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins County, Tennessee*, 402 U.S. 600, 604-05 (1971), and found that Gateway was neither (1) created directly by the state, so as to constitute departments or administrative arms of the government, nor (2) administered by individuals who are responsible to public officials or to the general electorate. *Associated Builders*, Pet. App. at 37, 47. Therefore, Gateway Corporation was found to be a private entity.

The Petitioner, however, asserts that Gateway is an economic partner of the local government, and thus should be considered an arm of the government for purposes of First Amendment analysis. The Petitioner incorrectly relies upon *Lebron v. Nat'l R.R. Passenger Corp.*, ___ U.S. ___, 115 S.Ct. 961 (1995), to support his assertion. In

Lebron, the United States Supreme Court determined that Amtrak was a government agency for purposes of First Amendment analysis for three reasons. *Id.*, ___ U.S. at ___, 115 S.Ct. at 972, 974. First, the federal government mandated the creation of the corporation through the Rail Passenger Service Act of 1970. *Id.*, ___ U.S. at ___, 115 S.Ct. at 973, 974. Second, the corporation was created specifically to further stated government objectives, mainly to ensure that rail passenger service would remain a means of transportation. *Id.* Finally, the Supreme Court found that the government retained for itself, under the creating statute, the permanent authority to appoint a majority of the corporation's directors. *Id.*

The Eighth District, in the present case, concluded that *Lebron* was not controlling, and that Gateway was not a governmental actor or agency for the purposes of First Amendment analysis. *City of Cleveland v. Bregar*, No. 67999 (1995, 8th District, Cuyahoga County) (Pet. App. 1-18). Unlike the Passenger Service Act of 1970, which mandated the creation of Amtrak, Ohio Revised Code section 307.696 was not a directive. Instead of mandating the formation of a specific corporation, O.R.C. section 307.696 merely authorized non-profit corporations to form in conjunction with local government in any city in Ohio for the purpose of constructing and/or operating sports complexes. The Eighth District, in the instant case, correctly focused on the distinction between mandating and authorizing the formation of a corporation:

> Whether a non-profit corporation is a political subdivision depends not on whether its formation is mandated or merely authorized; the difference is whether its formation is attributable

> to private, rather than governmental, action. When a state mandates the creation of an entity, the entity is fairly called a governmental actor. When a state *allows*, instead of *mandates*, a local government to create an entity, that entity, if formed, is still a governmental actor, since it was a local government that formed it. Only if an entity is *allowed* to be formed by a *private actor* is the entity a nongovernmental actor.
>
> . . . *The statute enabling Gateway, however, merely allows local governments to enter into agreements with private entities who may form or not, as they wish, in order to pursue a goal in tandem with that local government.* "(Gateway's) contractual relations with . . . political subdivisions . . . do not transform (Gateway) itself into a political subdivision of the State." *Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570, 572 (1981, 8th Cir.). (emphasis added).

Id., citing *Associated Builders*, Pet. App. at 23-24. The present case is distinguishable from *Lebron*. The Ohio statute permitted any Ohio city and/or county government to enter into agreements with private entities to develop and construct sports complexes. The Ohio Legislature did not mandate the formation of Gateway Corporation, as the federal government did with the Rail Passengers Act and the formation of Amtrak. Gateway was not created by a directive of the Ohio Legislature; instead, the statute allowed local governments to enter into agreements with private entities as local government planned its city's development. Thus, relations between Gateway Corporation and city and county government did not transform the private corporation into an entity of the state.

The Petitioner also incorrectly asserts that the "symbiotic relationship" test articulated in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), shows that Gateway Corporation is a state entity. *Burton* is clearly distinguishable from the facts presented in the instant case. In *Burton*, the land and the parking garage were state owned and operated. The State of Delaware entered into a lease with a restaurant to rent out some of the extra space available in the parking garage. The restaurant, however, discriminated against black customers. The Court held that "by its inaction . . . the State . . . not only made itself a party to the refusal of service, but has *elected to place its power, property and prestige* behind the admitted discrimination." *Id.* at 725 (emphasis added).

The present case is clearly distinguishable from *Burton* in that Gateway Corporation does not lease Jacobs' Field from the city or county. Gateway Corporation owns and operates the complex. The property needed to construct the complex was purchased by the Greater Cleveland New Stadium Corporation, not by the state. *Associated Builders*, Pet. App. at 7-8. Further, Gateway was the "builder, owner and operator of the sports complex itself" and and could enter into any leases necessary to operate the complex. *Id.* at 9. These powers clearly are characteristics attributable to a private entity, not to an entity controlled by the State. The "symbiotic relationship," therefore, is clearly lacking. Gateway Corporation is not a tenant on state-owned property. Gateway Corporation is an independent private entity, not an arm of the state.

B. The Petitioner stood on Gateway Corporation's private property, thus Gateway Corporation had the right to remove the Petitioner when he created a safety hazard to fans attending the Indians' game.

As Gateway controls private property, Gateway could remove the Petitioner from its premises. The First Amendment safeguards "the rights of free speech and assembly limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only." *Lloyd Corp.*, 407 U.S. at 567. The Supreme Court has further held that property does not lose its private character merely because the public is generally invited to use it for designated purposes. *Id.* at 569. The Petitioner was clearly on private property at the time of his arrest for Criminal Trespass. Gateway Corporation's property is private property which carries with it all of the rights, privileges and responsibilities of ownership. Game security, which is hired by Gateway Corporation, observed the Petitioner's sign creating a safety hazard for the thousands of fans entering the stadium. Commander Sade, acting on the complaint and in the capacity as Gateway security personnel, simply asked the Petitioner to move eight feet to the side to ensure the safety of the fans. The Petitioner refused. Commander Sade read the Petitioner the Criminal Trespass ordinance, yet the Petitioner still refused to move. The Petitioner was then arrested for Criminal Trespass. Gateway Corporation had the right to remove the Petitioner from its property when the officials observed a potentially hazardous situation. As Gateway Corporation is a private entity owning private property, and the Petitioner was

protesting on Gateway's property, he was not subject to the full protection of the First Amendment. Gateway Corporation, as a private property owner, did exactly what it was entitled to do. Therefore, the instant case does not present a constitutional issue for the Court to resolve, and the Petitioner's Writ of Certiorari should be denied.

II. If Gateway property is determined to be a public forum, the application of the Criminal Trespass ordinance is a reasonable time, place and manner restriction.

Arresting the Petitioner for Criminal Trespass outside of Jacobs' Field was a reasonable time, place and manner restriction as the placement of the Petitioner's sign outside of the stadium an hour before a sold-out Cleveland Indians game created a safety hazard to the thousands of fans attempting to enter the stadium. The state may place reasonable time, place and manner restrictions on speech that takes place in a public forum. The United States Supreme Court provided a three-pronged test to determine if such a restriction is reasonable. A restriction is justified if:

1) the regulation is content-neutral;
2) the regulation is narrowly tailored to serve a significant governmental interest; and
3) there are ample alternative channels for communicating the information.

United States v. Grace 461 U.S. 171, 177 (1983), citing *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983).

In the present case, the Petitioner displayed a large sign on Gateway property one hour prior to the start of the Cleveland Indians game. Over 42,000 fans were in attendance that day. An estimated 20,000 fans were attempting to enter the gate near where the Petitioner stood. The Petitioner's sign forced the fans moving elbow-to-elbow to walk into the curb-lane of a busy downtown street. The Petitioner, in exercising his right to free speech before game time in such a crowded area, engaged in an activity incompatible with the normal activity for this particular place at this particular time, which was to allow tens of thousands of fans to enter Jacobs' Field in a safe and orderly fashion free from interference and obstructions.

A. The time, place and manner restriction in this case was content-neutral.

The Petitioner's arrest was not an attempt to suppress the content of the Petitioner's message. "FIELD OF GREED." In a public forum, the government may not deny access to those who wish to express a controversial view, while allowing the use of that forum to persons whose views the government finds acceptable. *Police Dept. of Chicago v. Mosley* 408 U.S. 92, 95-96 (1972). In the present case, the Petitioner was not arrested because of the content of his speech, but rather because he was creating a significant safety hazard for Indians' fans trying to get to the game. Commander Sade testified at the Motion to Dismiss hearing that similar protests were held before and during the game. Sade testified that an unidentified man carried a ten to twelve foot high replica of

Chief Wahoo, the Indians' mascot, with a message similar to the Petitioner's sign pertaining to the impending baseball strike. The man with the large Wahoo sign had a ticket for the game and was permitted to take the sign into Jacobs' Field and display it during the game. Had Gateway wanted to suppress the fans' displays of anger concerning the inevitable baseball strike, officials would not have permitted any signs against the baseball strike into the stadium. Gateway officials clearly were not attempting to suppress the content of the Petitioner's message when the Petitioner was arrested. Therefore, enforcement of the Criminal Trespass ordinance was content-neutral and was not an attempt by the state to suppress the Petitioner's message.

B. The time, place and manner restriction was narrowly tailored to serve a significant government interest.

The government had a significant interest in moving the Petitioner from his original protest spot as the Petitioner created a safety hazard to the thousands of fans attempting to enter Jacobs' Field for the sold-out Indians' game. Further, the restriction of the Petitioner's protest was narrowly tailored to fulfill the government's interest in fan safety and orderly traffic flow. The United States Supreme Court has held that: a restriction narrowly tailored to serve a legitimate government interest

> need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government

> interest that would be achieved less effectively absent the regulation.

Ward v. Rock Against Racism, 491 U.S. 781 (1989). The appellate court in the present case stated that "the exercise of . . . free speech is not completely unfetterd in an area which is treated as a public fora for purposes of the First Amendment." *Bregar,* Pet. App. at 16, citing *Planned Parenthood Ass'n of Cincinnati v. Project Jericho,* 52 Ohio St. 3d 56 (1990). The Supreme Court of Ohio has held that the First Amendment rights *"do not include the right to imperil public safety* or to harass others in exercise of their rights." *Planned Parenthood,* 52 Ohio St. 3d at 59, citing *United States v. Dickens,* 695 F.2d 765, 772 (C.A.3, 1982) (emphasis added).

In *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 604 (1981), the Minnesota State Fair had a policy that required any organization wishing to distribute information or solicit donations to register and remain at a designated booth. The Krishna organization argued that one of its religious rituals required its members to mingle amongst the crowd to distribute and sell religious literature and solicit donations. The United States Supreme Court held that the state had a significant government interest in maintaining the orderly movement of the crowd and protecting the safety of the visitors at the fair. *Id.,* 452 U.S. at 651. The rule was narrowly tailored to fulfill the state's significant interest because all organizations had to register and remain in the designated area in order to ensure patron safety and the orderly flow of visitor traffic.

In the present case, similar to *Heffron*, fan safety and the orderly flow of traffic were the concerns of security officials. The Petitioner's protest occurred as thousands of people attempted to enter Jacobs' Field for a sold-out baseball game. Commander Sade explained to the Petitioner Jacobs' Field's policy prohibiting people from distributing pamphlets, selling tickets, or demonstrating in any way that would interfere with the pedestrian flow of traffic. The Petitioner's conduct not only impeded the fans' orderly movement into the stadium, but also placed the fans in danger by forcing them into the curb lane of game-congested Ontario Street. In the present case, as in *Heffron*, the state had a significant government interest in the orderly movement of the crowd and in ensuring the safety of the fans. Further, asking the Petitioner to move eight feet was not an intrusive or an unreasonable request. The government interest of public safety and orderly traffic flow could not have been effectively achieved in this particular area without asking the Petitioner to move a few feet to the side. Therefore, the restriction was narrowly tailored to promote the government interest by prohibiting all activities, not just those protesting against the baseball strike, which impeded the flow of traffic and the fans' safety.

C. The time, place and manner restriction afforded the Petitioner ample alternative channels for communication of his message.

The Petitioner was afforded alternative channels for communicating his anger with Major League Baseball and the impending strike as the Petitioner was asked by officials to move a mere eight feet from his original protest

spot. In *Lloyd Corp.*, 407 U.S. 551, the United States Supreme Court held that protestors had no right to distribute handbills in a privately owned shopping complex. The Court found that even with the protestors being denied access to the shopping center, there were adequate alternative avenues for communicating their ideas. *Id.* at 566. The Court found that the shopping center was surrounded by 66 linear blocks of public sidewalk and that the protestors would still have been able to reach their intended audience from the sidewalk since patrons of the shopping center had to cross the sidewalks to enter the complex. *Id.*

The Petitioner clearly had ample alternative channels for communicating his message to the intended audience. He merely had to move eight feet from his original spot. Commander Sade further testified that had the Petitioner moved that eight feet, the message on the sign would have been seen by a greater number of the fans. The Petitioner also had the option of going into the ballpark with the sign where 42,000 fans could have read his message. Therefore, Commander Sade's request was not unreasonable, and the Petitioner was afforded ample opportunity to have his message communicated to its intended audience.

D. The Criminal Trespass ordinance does not vest unfettered discretion in City officials to deny access to the forum in question.

The Supreme Court of Ohio in *W. Jefferson v. Robinson*, 1 Ohio St. 2d 113, 115, 205 N.E.2d 382 (1965), held that the power of an Ohio municipality to enact local

police regulations is conferred under the "Home Rule," Section 3, Article XVIII, of the Ohio Constitution. This grants Ohio municipalities the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations. The court in *Cincinnati v. Thompson*, Ohio App. 3d 7 (1994), held that a municipality may adopt and enforce an ordinance which constitutes an exercise of its power of local self-government or a police regulation. In that case, the court held that an ordinance proscribing the act of criminal trespass on a medical facility was a valid exercise of the city's police powers.

The Petitioner, in the present case, relies on *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 252 (1969), for the proposition that a government may not empower its officials to decide who gets to speak and who does not. He argues that someone could be arrested simply for refusing to leave. These are not the facts in the present case. Commander Sade did not attempt to suppress the Petitioner's message. He was not told initially that he had to leave the area. In fact, Commander Sade asked the Petitioner to move eight feet away from his original position in order to allow the free flow of pedestrian traffic. Further, the Petitioner was free to remain on private Gateway property – he could have easily displayed his sign inside the ballpark. It was only when he refused to move a few feet over, after repeated requests to do so, that Commander Sade had no other option but to arrest the Petitioner.

Further, the Petitioner incorrectly cites *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), to support his argument that Gateway officials were vested

with unfetterd discretion regarding the exclusion of demonstrators. *Lakewood* does not apply to the case bar and is clearly distinguishable from the instant case. *Lakewood* involved a prior restraint on speech. The city ordinance granted the licensor the power to deny permits for news stands. The ordinance did not have a set criteria for determining how to deny a permit. Without any guideposts, the licensor could grant and deny permits on an ad hoc basis. *Id.* The Court held that this was an "illegitimate abuse of censorial power." *Id.* at 758.

In the present case, there was no licensing mechanism controlling speech at Gateway, thus there was no prior restraint against the Petitioner's speech. Commander Sade observed a potentially hazardous situation, so he requested that the Petitioner move a few feet. Commander Sade further testified that Gateway's policy forbids anyone from selling tickets, scalping tickets, handing out paraphernalia, and any kind of demonstration that would cause inconvenience and danger to fans in the area. The Criminal Trespass ordinance applies to everyone. No one is permitted to impede the flow of traffic at Gateway. Any person, not just the Petitioner, who creates a safety hazard at Gateway is asked to move.

CONCLUSION

Gateway Corporation is a private corporation, not an arm of local government. Gateway Corporation built, and currently controls and operates, the professional sports complex in downtown Cleveland, home to Jacobs' Field and Gund Arena. Gateway Corporation was formed

under Ohio Revised Code section 307.696 which authorized local governments to enter into agreements with private entities for the purpose of developing sports complexes similar to the Gateway complex. The Ohio legislature did not mandate the formation of Gateway Corporation. The Legislature simply allowed any city in Ohio to enter into an agreement with private entities to pursue the development of sports complexes. The Greater Cleveland New Stadium Corporation, which eventually merged into Gateway Corporation, bought the land from the City of Cleveland. Gateway Corporation then built the complex, and currently owns and operates, the property. Further, Gateway Corporation can enter into any lease necessary to operate the complex.

The Petitioner, in the instant case, held his protest on private property an hour before a sold-out Cleveland Indians game. The Petitioner was arrested for Criminal Trespass as he was on private property and refused to move eight feet to the side when Gateway officials noticed that the Petitioner was creating a safety hazard for fans attempting to enter the game. The Petitioner was on private property at the time of his arrest, thus he is not subject to the full protection of the First Amendment.

If Gateway's property is found to be a public forum, arresting the Petitioner under the Criminal Trespass ordinance was a reasonable time, place and manner restriction. Enforcement of the ordinance was content-neutral. Security was not attempting to suppress the Petitioner's message. The restriction was narrowly tailored to serve a significant government interest. Gateway officials were concerned about the orderly flow of pedestrian traffic and the safety hazard, as fans had to walk into a busy

downtown street to avoid the Petitioner's sign. Finally, the Petitioner was afforded ample opportunity to communicate his message to his intended audience. Security asked the Petitioner to display his sign a mere eight feet from his original position. The Petitioner refused to move and was arrested. The time, place and manner restriction was reasonable as officials were not attempting to suppress the Petitioner's message, but to ensure the safety of the thousands of fans attempting to enter Jacobs' Field for the last game before the Major League Baseball strike. Therefore, the Respondent requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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